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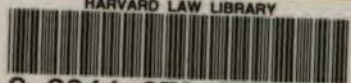
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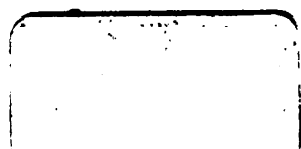
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Jan. 8



PRACTICE REPORTS
IN THE
SUPREME COURT
AND
COURT OF APPEALS
OF THE
STATE OF NEW-YORK.

By NATHAN HOWARD, JR.,
COUNSELLOR-AT-LAW, NEW-YORK.

VOLUME XV.

NEW-YORK:
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1858.

Entered, according to Act of Congress, in the year eighteen hundred and fifty-eight,

By NATHAN HOWARD, JR.,

In the Clerk's Office of the District Court of the Southern District of New-York.

Rec Aug 20, 1862



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PRACTICE REPORTS.

SUPREME COURT.

LAFAYETTE D. HOLSTEIN agt. DAN RICE.

The plaintiff brought his action on a promissory note, and in his complaint alleged that the note was made by the defendant payable to his own order, and by him indorsed and delivered to one J. M., for a valuable consideration; and that the plaintiff is now the *bona fide holder and owner* of the note.

Held, that a demurrer to the complaint that it did not state how the plaintiff became the holder and owner of the note, was not well taken. (*This is adverse to White agt. Brown*, 14 How. 282, and supposed to be adverse to *Thomas agt. Desmond*, 12 Id. 321.)

At Chambers, June, 1857.

MOTION for judgment on account of frivolousness of demurrer.

THE complaint contains two counts, each upon a promissory note made by the defendant, payable to his own order and by him indorsed and delivered to one John Maginnis, for a valuable consideration. It is further alleged in each count, that the plaintiff is now the *bona fide holder and owner* of the note, and the plaintiff claimed judgment for the amount of both notes, with interest.

The defendant demurred to the complaint, on the ground that no facts were stated showing how the plaintiff became *the holder and owner* of the notes. The plaintiff, pursuant to the 247th section of the Code, moved for judgment.

Holstein agt. Rice.

H. HARRIS, *for plaintiff*.C. B. COCHRAN, *for defendant*.

HARRIS, Justice. The demurrer is not well taken. The complaint shows that the defendant has made two negotiable promissory notes and delivered them to his creditor, and that these notes, at the time of the commencement of this suit, were held and owned by the plaintiff. This is, *prima facie*, enough to entitle the plaintiff to recover. If the plaintiff, as he alleges, is the *bona fide* holder and owner of the notes, it does not concern the defendant to know how he came by them. It is not necessary that it should be alleged through whose hands the notes were passed, or whether the plaintiff acquired them by indorsement or mere delivery. If the defendant doubts whether it is true that the plaintiff is the *bona fide holder and owner*, he has but to deny the allegation, and then the plaintiff will be required to establish the fact of his ownership. Of this the mere production of the notes, if indorsed in blank, would be sufficient evidence in the first instance. If specially indorsed, some other evidence might be required. In either case, the fact to be established would be that which this demurrer admits, that the plaintiff is the legal holder and owner of the notes. (See *Benson* agt. *Cushman*, 1 *Code Rep.* 119; *Taylor* agt. *Corbiere*, 8 *How.* 385; *Mitchell* agt. *Hyde*, 12 *How.* 460; *James* agt. *Chalmers*, 5 *Sand.* 52.)

In *Russell* agt. *Clapp*, (7 *Barb.* 482,) the action was upon a judgment recovered in another state, by the plaintiff. The answer was, that the plaintiff was not *the real party in interest* in the action. It was held, that the answer was insufficient, for the reason that the question whether or not the plaintiff was the real party in interest, was not a traversable fact. But if, instead of alleging that the plaintiff was not the real party in interest, the defendant had alleged that some other person, by assignment or operation of law, had become, and then was the owner of the judgment, or even that the plaintiff was not the owner of the judgment, I suppose the answer would not have

been held to be insufficient. *Bentley agt. Jones* (4 How. 202) was decided upon the same principle.

The case of *Parker agt. Totten*, (10 How. 233,) is clearly distinguishable from that now under consideration. The action was against the maker and indorser of a promissory note. The complaint stated that the payee indorsed the note and delivered it, but to whom he delivered it, was not stated. The only other allegation in the complaint was, that the note "before it became due, was duly delivered to, and came into the possession of the plaintiffs." This was clearly insufficient to show the plaintiffs' right to sue upon the note. It did not appear that the plaintiffs were at the time of the commencement of the action, or indeed, that they ever were, the owners of the note. The case did not even come up to that of *Beach agt. Gallup*, (2 Code Rep. 66,) where the allegation was, that the plaintiffs, when they brought their action, were the lawful holders of the note.

The only case cited by the defendant's counsel, which can be regarded as an authority in support of this demurrer, is that of *Thomas agt. Desmond*, (12 How. 321.) In that case, the action was brought to recover money alleged to be due from the defendant, upon a contract between him and third persons. The allegation of the complaint, to show the right of the plaintiff to bring the action, was, that he was then the sole owner of the demand. The learned judge before whom the case was brought, upon a demurrer to the complaint, was of opinion that the defendant had a right to be informed by the complaint, not only that the plaintiff was the owner of the demand, but how he became such owner, and the allegation was held to be insufficient, because no facts were stated, showing how it happened that the plaintiff was the owner of the demand. But it seems to me, that the material allegation was that which the complaint contained. If it was true that the plaintiff was the sole owner of the demand, he was entitled to maintain the action, however he may have acquired his ownership. The assignment or other evidence of his ownership, could only be material for the purpose of sustaining the principal allegation. If

the defendant had denied the allegation, he would have put the plaintiff to proof of his ownership. If he did not deny it, then he need not be informed how the plaintiff became such owner. The motion for judgment must be granted, but with liberty to the defendant to answer the complaint within six days, upon serving an affidavit of merits, and paying the costs of this motion.

NOTE.—It is a singular fact that the same cases to which Judge WELLES refers in the case of *Thomas agt. Desmond*, to sustain his opinion in that case, are referred to by Judge HARRIS, as sustaining the present opinion. Is there any difference in principle, considered as applicable to pleadings, in an allegation that "*he is the real party in interest*," and the allegation that "*he is the lawful holder and owner*?" They are not synonymous terms; but both are unquestionably *conclusions of law*. And are these allegations sufficient *under the Code*, without being accompanied by a statement of facts warranting their legal conclusions? That would seem to depend upon the actions to which they are applied.

For instance, in the case of an action upon a *promissory note* or *negotiable paper*, (to bearer or properly indorsed,) the allegation that the plaintiff is the lawful holder and owner of the note, without a statement of the facts as to how he became so, would seem to be sufficient, because the law implies the necessary facts from the character of the paper. That is, the law imports a valuable consideration as to the holder. And the allegation of lawful holder or owner, makes out a *prima facie* case. The plaintiff on the trial, may prove these facts on production and proof of the note itself.

Whereas, in regard to instruments or paper not negotiable, the allegations of the plaintiff being the lawful owner, or the real party in interest, must be sustained by proof of facts *aliunde* the instrument declared on, and consequently the complaint must allege these necessary facts, to make out a *prima facie* cause of action. The law in such case imports nothing, as to the consideration or title in the holder. It is true, a *sealed* instrument imports a consideration, so far as to estop the grantor from alleging that it was executed without consideration; for every other purpose the consideration clause is open to examination, and may be varied by parol proof. If these views of pleading are correct, the case of *Whit's agt. Brown*, (*supra*), decided by Judge MULLETT, was incorrectly decided, and the case of *Thomas agt. Desmond*, (*supra*), decided by Judge WELLES, and this case by Judge HARRIS, are both correct, though the latter for reasons somewhat different from those there given.—[REPORTER.]

Kamena agt. Warner and Thompson.

SUPERIOR COURT.

JOHN KAMENA agt. JOHN J. WARNER and WILLIAM
THOMPSON.

Where an attachment is issued out of a justice's court, the statute prescribes that the claimant of the goods attached may execute a bond in a penalty, double the value of the property attached. But it also contemplates that the goods attached shall be fully sufficient to discharge the debt, if judgment is recovered upon it, and it presumes that nothing more shall be attached.

When, therefore, a bond is given or offered by the claimant of the goods, in double the amount of the demand, it is sufficient, although there may have been property attached to a much larger amount than double the value of the debt.

New-York Special Term, October, 1857.

MR. SHEHAN, *for defendant.*

MR. JENNISS, *for plaintiff.*

DEMURRER to complaint by defendant Warner.

Attachment out of justice's court to recover a debt of \$421; the goods attached are alleged in the complaint to be worth \$2,300. The writ was against *Wolfe Kamena*; John Kamena claimed them, and tendered a bond approved by the justice of the court, who issued the attachment, in the sum of \$1,000, with sureties.

The bond was refused, and the goods were removed. The action is by the claimant for the value of the goods and damages.

On demurrer,—

HOFFMAN, Justice. The 34th section (formerly 33d) of the statute provides, that "if any person claims any goods and chattels attached by a constable, he may execute a bond, to be approved of by the constable or the justice who issued the attachment, in a penalty double the value of the property at-

Kamena agt. Warner and Thompson.

tached, conditioned that in a suit to be brought on such bond within three months, such claimant will establish that he was the owner of the goods seized at the time of such seizure, and in case of his failure to do so, that he will pay the value of the goods so claimed, with interest."

And by section 35, "upon such bond being executed and delivered to the constable, he shall deliver up the property seized by him, to the obligor in such bond."

It is plain that the bond in question was not a literal compliance with the statute; as the property is stated in the complaint to have been worth \$2,300. But the counsel well argues, that a construction which would permit a constable in his caprice, to seize goods worth \$10,000 for a demand of one hundred, and drive the claimant to give security for that full amount, or part with possession, would work needless and great injustice. I am satisfied it is not the necessary and only construction which the provision will bear.

Under the 31st section, the amount of the debt is to be stated, and the constable is to attach so much of the goods and chattels of the debtor as will be sufficient to satisfy such debt.

It is true that the statute contemplates that the case may well occur of more goods being taken, and properly taken, than are indispensable for this purpose. Therefore, under the 30th section, the plaintiff in the action gives bond to account for any excess beyond the judgment which he shall recover; and by the 38th section, where an action has been brought against the claimant, upon his bond given under the 34th section, if the amount recovered exceeds the amount of the judgment rendered for the plaintiff in the attachment suit, the plaintiff shall refund the excess.

In short, the principle of the act is, to give security by virtue of an attachment upon goods of the full value of the claim of the plaintiff.

The 34th section then contemplates that the goods attached shall be fully sufficient to discharge the debt, if judgment is recovered upon it; and the act presumes that nothing more

In the matter of Henry Dubois and others.

shall be attached. When a bond is given for double the amount of the demand, it amply meets what the plaintiff can possibly obtain, and it is double the value of the property attached, because it was intended that no more should be attached than would fully secure the party.

I think the demurrer is not well taken, and judgment must be had for the plaintiff upon it, with costs.

SUPREME COURT.

In the Matter of the application of HENRY DUBOIS and others, trustees, &c., for the dissolution of the Westchester Iron Company.

On petition for the dissolution of an incorporated company, the statute (2 R. S. 467) must be fully complied with in all its particulars.

Wherein the application in this case was held defective, stated.

GEO. WHITE, *for the petitioners.*

BIRDSEYE, Justice. The application does not conform to the statute (2 R. S. 467, § 59) in the following particulars. It does not contain any statement of the books, vouchers and securities relating to the estate of the corporation. (*Sub. 1.*) It contains no statement of the incumbrances on the property of the corporation. (*Sub. 3.*) It does not state the nature of the debt or demand due the several creditors, and the true cause and consideration of such indebtedness, in each case. (*Sub. 4.*)

I think it should also be stated that the stock not stated to be issued to the stockholders named, is still owned by, or in the possession of the corporation; or at least, that it has not been issued.

I am also of opinion, that the inventory of the estate is not such as the statute intends. The property ought to be *identified*: to be so fully described as, if it be land, by metes and

Treadwell and others agt. Lawlor.

bounds, or by references to conveyances, or otherwise, that the receiver may be enabled to take possession of the property. Such an inventory, and a full statement of the books, vouchers and securities relating to the property, will be required in order to put it within the power of the receiver to be certain that he has obtained *all* the property, and to bring such actions or take such other steps as may be necessary to pay the liabilities of the company.

As the principal office for managing the affairs and business of the company is, by the articles of association, declared to be in the city and county of New-York, (though several other places in different counties are named, where the operations of the company are to be carried on,) the notice of the order should be published, and the hearing before the referee should be had, in New-York.

The petitioners may withdraw their application for the purpose of conforming it in the particulars above stated to the statute.

SUPREME COURT

JOHN P. TREADWELL and others agt. JOHN M. LAWLOR.

A defendant is liable to attachment under the Code, where he has assigned, disposed of or secreted *his* (the defendant's) property, or any part thereof, or is about to do so. (§ 129.)

This means, any property in the defendant's possession, and to which he claims title, although his title may be imperfect, or clearly bad. The design of the defendant is as manifest in concealing embezzled property, as in concealing that which is actually his.

The court acquires jurisdiction of an action from the time the summons is served or any provisional remedy is *allowed*. (Code, § 139.)

The issuing of summons is not necessary to the validity of the attachment.

New-York General Term, Nov., 1857.

MITCHELL, CLERKE and PEABODY, *Justices.*

By the court—MITCHELL, Justice. The defendant moved to

set aside the attachment against him, without denying any of the charges made against him. One of them is, that he had stolen, secreted or embezzled money of the plaintiffs, to the amount of \$5,000 and upwards; that he said he had deposited part of the proceeds in the name of a little sister, which before he had said was in his mother's house, and he acknowledged that he did this to prevent suspicion against himself, and to prevent the property being taken from him, and to conceal it.

The Code as amended (§ 229) allows an attachment against a defendant who has assigned, disposed of or secreted, or is about to assign, dispose of or secrete any of his property, with intent to defraud his creditors. The declarations of the defendant clearly show that he had disposed of and secreted *this* property with such intent. The Code speaks of the secreting of the *defendant's* property. By that was meant any property in his possession, and to which he claimed title, although his title was imperfect or clearly bad. The injury to the creditor, and the intent to defraud, are as clearly shown in that case, as if the defendant had a perfect title to the property. The attachment lies, if the defendant has, or is about to secrete "*any*" single piece of his property, and extends to all his property of every kind, because the single act shows a readiness and an intent to extend the offence as far as may be necessary, to promote his fraudulent designs. This design is as manifest in concealing embezzled property, as in concealing that which is lawfully his.

It has been repeatedly held that the attachment is the commencement of process, although no summons be served; the issuing of a summons alone, is not the commencement of action, and would not aid in giving jurisdiction to the court, until it is served; its issuing is not necessary to the validity of the attachment. This, also, has been repeatedly held in this court. The court acquires jurisdiction from the time the summons is served, or any provisional remedy is allowed. (*Code*, § 139.) The order appealed from, denying the motion to set aside the attachment, is affirmed with costs.

SUPREME COURT.

HENRY MILLER agt. STEPHEN ROSSMAN.

Where an execution has been returned unsatisfied within five years from the entry of judgment, an order under § 292 of the Code in proceedings supplementary to execution, may be issued, *after five years* from the entry of judgment.

The doctrine of the case of *Currie agt. Noyes*, (1 *Code R.*, N. S. 198,) which holds adversely, ought not to be extended beyond its own peculiar circumstances. If carried out to its legitimate results, it would debar a judgment creditor from ever instituting such proceedings on a judgment of over five years' standing. Because, an execution may be issued by leave of the court after five years from the entry of judgment; but there is no provision for applying to the court for leave to issue an order in proceedings supplementary to execution. The *court*, as such, is not authorized to entertain these proceedings at all. The order must be made only by a *judge* of the court or a county judge.

Albany Special Term, June, 1857.

MOTION to set aside proceedings supplementary to execution.

The judgment in this action was recovered on the 28th day of May, 1851. On the 18th of May, 1853, an execution was issued thereon to the sheriff of Columbia, the defendant being a resident of that county. The execution was returned unsatisfied. On the 20th of November, 1854, the defendant removed to the state of Michigan, where he remained until the 30th of May, 1857, when he returned to Columbia county.

On the first day of June, 1857, the plaintiff obtained from the county judge of Columbia, an order for the defendant to appear and answer concerning his property, pursuant to the 292d section of the Code, which order was served on the 3d of June. These proceedings are still pending. The defendant moved to set aside the order of the county judge and all subsequent proceedings, on the ground that more than five years had elapsed since the recovery of the judgment.

JOHN M. WELCH, *for plaintiff.*

H. B. WHITBECK, *for defendant.*

Miller agt. Rossman.

HARRIS, Justice. I was at first inclined to grant this motion upon the authority of *Currie agt. Noyes*. (1 *Code R., N. S.* 198.) But, upon more consideration, I am satisfied that the doctrine of that case ought not to be extended beyond its own peculiar circumstances.

Before the adoption of the Code, a creditor's bill might be filed at any time within ten years after an execution had been returned unsatisfied. (*Corning agt. Stebbins*, 1 *Barb. Ch.* 589.) The 292d section of the Code, declares that when an execution has been returned unsatisfied, the creditor, *at any time after such return made*, shall be entitled to an order for the examination of the debtor. There is no limitation or restriction, at least in terms, upon this right. On the contrary, the legislature had just before declared in the most positive and unrestricted terms, in respect to an execution, that after the lapse of five years from the entry of the judgment, it could only be issued by leave of the court. It was thought best, before allowing the property of a defendant to be seized upon an execution issued upon a stale judgment, to give him an opportunity to be heard. The same reason does not apply to supplementary proceedings.

The doctrine of *Currie agt. Noyes*, if carried out to its legitimate results, would debar the creditor altogether from the right to institute supplementary proceedings upon a judgment of more than five years' standing. An execution may be issued after five years, upon obtaining leave of the court. But there is no provision for obtaining leave to institute supplementary proceedings. The court, as such, is not authorized to entertain the proceedings at all. The order is to be made, not by the court, but by a judge of the court or a county judge.

Suppose this motion were to be granted, and the plaintiff were to obtain leave to issue a new execution, as he has done at the present term, the defendant would have the same ground for setting aside the supplementary proceedings which might be commenced upon the return of the new execution unsatisfied, that he has upon this motion. For he does not move now

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upon the ground that more than five years have elapsed since the issuing of execution in this cause. This he could not do, for the execution was issued in 1853. He relies solely upon the fact that it is more than five years since the judgment was recovered. In a case where the judgment was not only of five years' standing, but the execution had also been returned more than five years, I might feel constrained to follow the authority of *Currie agt. Noyes*, but even then it would be with some hesitation.

The counsel for the defendant seemed to think that the doctrine of *Currie agt. Noyes*, had been sanctioned in *Swift agt. Flanagan*. (12 *How.* 438.) But this is not so. The question before the court in that case was, whether, when an execution had been issued and returned unsatisfied within five years after the recovery of the judgment, another execution might afterwards be issued without obtaining leave from the court. Some judges had thought that this might be done. The case of *Currie agt. Noyes*, was cited to show that the court which decided that case thought otherwise. It was only pertinent for that purpose. The question now under discussion was in no way involved in that case. The motion must be denied, but I think it should be without costs.

SUPREME COURT.

THE BRIDGEWATER PAINT MANUFACTURING COMPANY agt.
DANIEL MESSMORE.

After a defendant has put in and justified bail, he cannot move for a discharge from the arrest. This, however, applies only to those stages of the action which precede the judgment.

If an execution be issued against the defendant's person, he may move to set it aside as not warranted by the facts: and it would be no answer to his application to say that he had allowed himself to be arrested by preliminary process.

Bridgewater Paint Manuf. Co. agt. Messmore.

New-York Special Term, December, 1857.

DEFENDANT in this case was arrested and held to bail for money received in a fiduciary capacity, and after the justification of bail, he made a motion to be discharged from arrest, upon affidavits denying, as he alleged, the facts stated in plaintiff's affidavit, as the grounds of the arrest in this action.

LUMAN SHERWOOD, *for motion.*

JNO. O. ROBINSON, *opposed,*

Who stated as a preliminary objection, that such motion could not be made after the perfecting of bail. That such was the rule under the old practice, and such is the rule under the Code. (§ 204 of Code; 2 Abbott, 384; 1 Duer, 645; 3 Sand. 706.)

SHERWOOD denied that the reason of the old rule applied to the present practice, and cited (*Corwin v. Freeland*, 2 Seld. 560,) as overruling all the former authorities upon this point.

ROOSEVELT, Justice. The language of the Code, as well as the authorities, are clear on this point, that after the defendant has put in and justified bail, he cannot move for a discharge from the arrest. Whatever is said of the reasoning, the rule is settled. It applies, however, only to those stages of the action which precede the judgment. The object of the arrest, as well as of the bail, is to secure the defendant's appearance whenever called for, at and previous to the judgment, and on the service of process to enforce it. (Code, § 187.)

That being accomplished, the bail is *functus officio*, and the estoppel created by giving it, ceases. Should an execution be taken out against the defendant's person, he may move to set it aside, as not warranted by the facts; and it would be no answer to his application to say that he had allowed himself, on the same facts, to be arrested by preliminary process. A quiet submission to one wrong may provoke, but does not

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justify another. Estoppels are not extended by implication. They are confined to the precise matter embraced in them. Although, therefore, the defendant cannot be relieved from an arrest which he has acquiesced in, he may be from an execution, as to the form of which, except incidentally, he has never been heard.

The present motion cannot be granted, but the denial is without prejudice to any motion which may hereafter be made to stay or discharge an execution against the person of the defendant.

SUPREME COURT.

The President, Directors and Company of the BANK OF
GENESEE agt. BURRAL SPENCER, impleaded.

To get rid of an order improperly made by a judge at chambers, the remedy is by *motion* to the *court* to set it aside.

A judge at chambers has no power to make an absolute, indefinite and continuing order, either to set aside or stay proceedings.

At most he has only power to stay the proceedings for a time, as until the next term, or until a rule *nisi* has been applied for, so as to afford an application to the court.

And this rule applies to proceedings supplementary to execution. The judge before whom these proceedings have been instituted and are pending, including a county judge, has sole and exclusive jurisdiction over them until they are finally disposed of.

No other judge or officer at chambers can have any power to come in and stay such proceedings by a general order, upon terms. It belongs to the duties of a judge sitting as a *court*, and not at chambers.

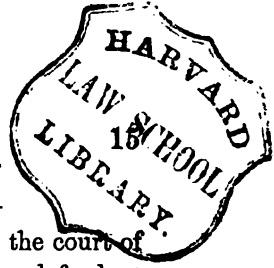
Seventh District General Term, September, 1857.

Pre-sent, JOHNSON, STRONG and SMITH, Justices.

THIS was a proceeding before the county judge of Genesee county, supplementary to execution. A reference was ordered for the examination of the defendant. From this order, the defendant appealed to the general term, where the order was

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affirmed. The defendant thereupon appealed to the court of appeals, and the appeal was there dismissed. The defendant then moved to set aside the execution, on which the proceeding was founded, on the ground that more than five years had elapsed since the rendition of judgment, and no leave to issue it had been granted by the court. This motion was also denied at special term, and the general term in the 8th district affirmed the decision on appeal. The defendant appealed from this decision to the court of appeals, where the matter is still pending. After this last appeal the defendant procured an order from Mr. Justice MULLETT, at chambers, on an order to show cause, staying all proceedings before the county judge until the decision of the appeal in the court of appeals, on condition that the defendant should, within twenty days, file security in the office of the clerk of Genesee county, in the penalty of \$4,500, conditioned that in case the appeal should be determined against the defendant in the court of appeals or dismissed, he would appear before the referee appointed, or pay the damages which might accrue to the plaintiffs by his failure to appear, or by any disposition he might make, or any incumbrance upon his property in the meantime, liable to be reached by such proceeding. The order allowed the county judge to adjourn the proceeding upon the reference until the decision of the appeal in the court of appeals. From this order the plaintiff appealed to the general term. On the hearing at the general term in the 7th district, in March, 1857, the appeal was dismissed, on the ground that the remedy was by motion to set aside the order as irregularly and improperly granted. The plaintiff then moved at a special term held in the 8th district to set aside the order. This motion was there denied, on the ground that the remedy was by appeal, and not by motion to set aside. From this order the plaintiff appeals to the general term.

J. L. BROWN, *for plaintiff.*

W. H. GREEN, *for defendant.*

By the court—JOHNSON, Justice. A judge at chambers

cannot make an absolute indefinite and continuing order, either to set aside or to stay proceedings. At most, he has only power to stay the proceedings for a time, as until the next term or until a rule *nisi*, has been applied for, so as to afford a party an opportunity of applying to the court to set them aside, or stay them generally. (3 *Chit. Gen. Prac.* 26; *Tidd*, 511.) We do not understand that the Code of Procedure has enlarged the powers of judges, at chambers, except in cases specially provided for. The general distinction between term and chamber duties is still retained in our practice. And whether these supplementary proceedings are proceedings in the original action, or are special proceedings, founded upon the judgment and return of the execution unsatisfied, it is quite obvious that a general stay by another judge, at chambers, must fall within the general rule. The judge before whom the proceedings had been instituted, and were then pending, had sole and exclusive jurisdiction over them, until they were finally disposed of; and it must be apparent, we think, that no other judge or officer, at chambers, could have any power to come in and stay such proceedings by a general order, upon terms. The order in question suspended the proceedings entirely, on terms, until an appeal from an order, in a distinct and separate proceeding, should be disposed of by the court of appeals. This, we think, is a power which a court alone could exercise. It belongs to the duties of a judge sitting as a court, and not at chambers.

He might, we think, at chambers, have granted a stay, until an application could be made to the court, for such an order as he undertook to make, but this would be the extent of his power. To get rid of an order improperly made by a judge at chambers, the proper practice is, to move the court to set it aside. The special term erred, we think, in refusing to set aside the order in this case. The order of the special term must therefore be reversed, and an order entered, vacating the chamber order, with ten dollars costs of appeal.

Belden agt. The New-York and Harlem Railroad Company.

SUPREME COURT.

TABER BELDEN, Respondent, agt. THE NEW-YORK AND
HARLEM RAILROAD COMPANY, Appellants.

A railroad company cannot be sued before a justice of the peace of a town through which their railroad passes, by a *short summons*. They are to be treated as inhabitants and freeholders in each county where their track is laid; consequently, entitled to the privilege of a long summons.

And they do not waive this objection by appearing and pleading after the objection is overruled.

Second District General Term, Poughkeepsie, April, 1857.

Present, S. B. STRONG, P. J., BIRDSEYE and EMOTT, JJ.

THE defendants, a part of whose road passes through the county of Dutchess, were sued in this action before a justice of the peace, in the town of Washington, in that county. The summons by which the action was commenced, was issued on the 11th January, 1855, was made returnable on the 15th of the same month. It was served on the 12th of that month. From the form of the summons, as well as from the affidavit taken before issuing it, it is obvious that the defendants were proceeded against as non-residents of the county. The defendants appeared and took the objection that the defendants were entitled to be sued by a long summons only, and to have service six days before the time of appearance named in the summons. The objection was overruled, and then the defendants answered, and went to trial.

E. M. SWIFT, *for plaintiff.*

R. G. DORR, *for defendants.*

By the court—BIRDSEYE, Justice. The same question is now presented. As it is already settled upon authority, we shall content ourselves with resting our decision upon those authorities; adding, only, that the principles of the cases to be cited, approve themselves to our judgment.

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In *Johnson agt. The Cayuga and Susquehanna Railroad Company*, (11 Barb. 621,) the general term of the sixth district, passed upon this very question; the learned Mr. Justice SHANKLAND delivering the opinion. They held that a railroad company may properly be sued in a justice's court, by long summons: that in cases of corporations, no provision is made by statute for process by warrant or attachment, or short summons, the provisions for such process being for the cases of natural persons when sued as defendants, and not of corporations.

In *Sherwood agt. The Saratoga and Washington Railroad Company*, (15 Barb. 650,) the court expressed a similar opinion. They held that a railroad company must be treated as an inhabitant and freeholder, in each county where its track is laid; that such a corporation, whose road passes through two or more counties, may be sued before a justice in either county, provided the process can be served on the proper officer, in such county; but that the summons, issued against such company, by a justice of the peace, must be made returnable, not less than six, nor more than twelve days from the time of service; and that a summons returnable in less than six days is a nullity; the justice thereby acquires no jurisdiction over the corporation as a non-resident.

The authorities are numerous and conclusive to the point that such an objection is not waived, by appearing and pleading after the objection has been overruled. (See *Avery agt. Slack*, 17 Wend. 87; *Hill agt. Stocking*, 6 Hill, 314; *Cunningham agt. Goelet*, 4 Denio, 71; *Ressequie agt. Brownson*, 4 Barb. 541; *Allen agt. Stone*, 9 Barb. 64; *Robinson agt. West*, 11 Barb. 309.)

As, therefore, the justice's court acquired no jurisdiction of the defendants, and had no authority to render any judgment against them, it becomes unnecessary to examine any of the other errors alleged to have been committed by the justice. The judgment of the county court of Dutchess county, and of the justice, are reversed with costs.

(EMOTT, J., having been consulted, took no part in this decision.)

Dresser agt. Van Pelt and Wicker.

SUPERIOR COURT.

HORACE DRESSER, Appellant, agt. REUBEN W. VAN PELT
and JAMES C. WICKER, Respondents.

Where the defendant in an order in proceedings supplementary to execution, in the first judicial district, was required to appear before the said justice, (naming him,) or one of the other justices of the said supreme court, and the defendant appeared before the said justice first named, on the return day, and an order of reference was made without objection to any irregularity in the order;

Held, assuming that the clause in the order to appear before one of the other justices, &c., was an irregularity, it could not affect the substantial rights of the party; the clause was mere surplusage; and especially that the party could not set up the objection by plea or demurrer in another action.

The supplementary proceeding under § 292 *et seq.* of the Code, is a proceeding in an action to enforce a judgment. It is not a *special proceeding* within § 3 of the Code.

The true sense and interpretation of the 27th section of the Code, appears to be this: A proceeding commenced in the *first judicial district* by any judge competent to institute it therein, may be *continued in such district, before any other judge* competent to have commenced it.

The case of *The Knickerbocker Bank*, (19 Barb. 602,) is authority decisive that the title of an order as made and entitled at *special term*, while the judge was actually engaged in a trial, in an interval of it, is authorized and regular, although the order is one properly and ordinarily made at *chambers*.

When a judge directs process (attachment, &c.) to issue, and has jurisdiction, and when any judge of the same court, who is found at the place designated, on the day specified for appearance, has jurisdiction, when place and time are distinctly pointed out in such process, the mere fact that the party is to be brought before the judge when holding a court at *special term*, (instead of before the judge at *chambers*,) does not render the proceeding or process void.

General Term, November, 1857.

Present, DUER, Ch. J., BOSWORTH, HOFFMAN, SLOSSON and WOODRUFF, Justices.

APPEAL from an order at special term overruling a demurrer to an answer.

The action was for an illegal arrest and false imprisonment, caused by the defendants. The defendants justify themselves upon the ground of orders and process issued out of the su-

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preme court, in an action in which the defendant Wicker was plaintiff, and the present plaintiff, defendant; that judgment had been recovered against the present plaintiff, and an order obtained for his examination under § 292 of the Code; and that various orders and process had ensued in such action, under which the arrest complained of had been made, and all which were duly and legally made and issued.

On the 17th of September, 1856, an order was made by Justice DAVIES of the supreme court, residing in the city of New-York, in the action above referred to, requiring the present plaintiff, defendant there, to appear before him, the said justice, *or one of the other justices of the said supreme court*, on the 20th of September, 1856, at 10 o'clock A. M., at the chambers of the said justices, and make discovery under oath, &c.

The present plaintiff appeared on the return day, and an order was made by Justice DAVIES, sitting as stated at special term and also at chambers, appointing a referee to take the examination and to report the same; such examination to be proceeded with at the chambers of the said supreme court.

The said Dresser left the chambers without submitting to such examination; a further order was then made on the same 20th of September, to show cause why he should not be punished for a contempt.

An excuse was made which was deemed sufficient, and an order was made by Justice DAVIES, (the said Dresser being present,) that he submit to an examination on the 23d of September, at 10 o'clock, before the referee. The examination was commenced on the day appointed, but the party, without the consent or permission of any one, left the room.

Thereupon another order was obtained from Justice DAVIES, requiring Dresser to show cause why an attachment should not issue against him and he be punished as for a contempt. This was adjourned from time to time until the 11th of October, 1856.

On the 11th of October, 1856, an order was made by Justice DAVIES, *while sitting at special term and also at chambers*,

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on hearing the parties, adjudging that the said Dresser had been guilty of a contempt in refusing to submit to such examination; and directed an attachment to issue, unless he submit to an examination as required by the order of the 20th of September, before the referee therein named, on the 13th of October, at 12 o'clock, at chambers, and pay \$10 costs.

The plaintiff (Dresser) neglected to obey this order, but appealed to the general term from the order adjudging him guilty of a contempt, of the 11th of October. The general term affirmed the order, with \$10 costs of the appeal.

On the 16th of December, 1856, proof was made of the said Dresser's disobedience to the orders; an order was made by Justice CLERKE, described as one of the justices of the said supreme court, while sitting at special term, and also at chambers, "that an attachment issue against the said Dresser for such misconduct and contempt; that a writ of attachment reciting the proceedings was issued to the sheriff of the city and county of New-York, commanding him to attach and arrest the said Horace Dresser, and to produce his body before *one of the justices of this court at a special term of the court*, to be held at the city hall in the city of New-York, on Friday the 19th day of December, 1856, at 10 o'clock A. M., and then and there to return such writ of attachment, in order that the said Dresser might be dealt with according to law."

This attachment was signed by the said Justice CLERKE, and sealed with the seal of the said supreme court. On the return of this attachment (having given bail for his appearance in the sum of \$100 as required) the said Dresser attended, and asked for time to clear his contempt, which was granted by said Justice CLERKE, who directed interrogatories to be filed and answers to be made thereto. This was done.

On the 11th of January, 1857, Justice CLERKE made an order that a commitment against said Dresser issue, unless he submit to the examination before the referee, as required by the order of Judge DAVIES, on five days' notice, and pay \$10 costs of motion, \$10 costs of the appeal, \$10 costs of this motion, and \$9 fees of the referee, being \$39, with the fees of

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the sheriff on the attachment, to be paid on or before Tuesday the 20th of January, 1857, at 9½ o'clock A. M. Notice was accordingly given to appear and be examined on the 21st of January, 1857, at 10 o'clock A. M., before the referee.

The costs and fees were not paid, and on application to Justice CLERKE, he granted a commitment on the 20th of January, 1857, to the sheriff of New-York, signed by the said justice, and attested by the clerk and with the seal of the court, commanding him to commit the said Horace Dresser to the jail of the county of New-York, and detain him until he should comply with the order of Mr. Justice CLERKE, of the 11th of January, 1857.

Notice being given by the sheriff, Dresser paid the fees as ordered, and commenced submitting to the examination.

The action is brought for the alleged illegal arrest on the 17th of December, 1856, (under the order of the 16th,) and also for that of the 21st of January, 1857, under the order of the 20th of that month.

HORACE DRESSER, *plaintiff, in person.*

R. W. VAN PELT, *for defendants.*

By the court—HOFFMAN, Justice. The first question raised, is as to the effect of the insertion of the clause in the order of Justice DAVIES, of the 17th of September, 1856, requiring the defendant to appear before him, *or one of the other justices of the said supreme court.*

The defendant (the present plaintiff) appeared before Justice DAVIES, on the return day, and an order of reference was made by the judge. No objection was then made to this alleged irregularity.

Assuming that it was an irregularity, and the insertion of the clause was not warranted by the 292d section of the Code, it appears to us clear, that as the appearance was before the judge who issued the order, and who then, without objection, acted upon it, there was such an error only, as could not affect the substantial right of *the party*; that the clause was mere

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surplusage; and that the plaintiff cannot raise the objection now. Particularly that it cannot be set up by plea or demurrer in another action. (*Kelly* agt. *McCormick*, 2 *E. D. Smith's R.* 503; and *Parke* agt. *Heath*, 15 *Wend.* 301.)

The next question is, whether another judge of the court could continue the proceedings commenced before Justice DAVIES? This proposition is also denied by the plaintiff, and forms one of his grounds of demurrer to the answer.

The application to Judge CLERKE, was a motion, which is defined to be an application for an order in an action.

By § 401 of the Code, this may be made to a judge or justice out of court.

By the 27th section of the Code, every proceeding commenced before one of the judges in the first judicial district, may be continued before another, with the same effect as if commenced before him. The previous clause of the section speaks of business done by a judge out of court.

The supplementary proceeding under § 292 *et seq.*, is a proceeding in an action to enforce a judgment. It forms part of title 9, entitled, "Of the execution of judgments in civil actions." It is not a special proceeding, within § 3 of the Code, although once treated as such by Justice WELLES. (4 *Howard's Pr. R.* p. 142.) The authors of the Code speak in their report (p. 2) of the parts of the entire Code relating to criminal actions, and to special proceedings, (including arbitrations, *habeas corpus*, the discharge of insolvent debtors, the enforcement of mechanics' liens, &c.,) as to form the subjects of future reports by them.

The proceedings under a railroad act, and under a plank road act, in the cases in 1 *Kernan R.* 274 and 3 *Code Reports*, 148, were special proceedings, within the sense of section 3, not a proceeding in a civil action within section 2.

The true sense and sound interpretation of the 27th section appears to me to be this; a proceeding commenced in the *first judicial district* by any judge competent to institute it therein, may be continued in such district before any other judge com-

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petent to have commenced it. The few authorities I have met with are the following :

Kelly agt. *McCormick*, (2 *E. D. Smith R.* 503,) the action was upon a bond given by a judgment debtor with sureties, to the sheriff upon an attachment. Supplementary proceedings had been taken after execution, and upon his disobedience, an order to show cause why an attachment should not issue was granted. An alias was issued, allowed by Mr. Justice WOODRUFF, with a direction to hold to bail in \$300. The direction to the sheriff in the writ was to attach the debtor, and bring him on a day named, at 10 A. M., before one of the judges of our court of common pleas for the city and county of New-York, at their chambers in the city hall, New-York, then and there to answer, &c.

The court held that the attachment was not void, even if it were improperly made returnable "before one of the judges of the court." It was voidable only. *If it was process of the court*, it was simply voidable and no bar to the action, and if it was not, then it was properly made returnable before one of the judges of the court, at chambers, as in this court any proceeding commenced before one judge, may be continued before another. (*Laws of 1840, p. 222.*)

I do not understand the decision in *Shepherd* agt. *Dean*, also in the common pleas, (13 *Howard*, 173), to be adverse to this. On the contrary, the act of 1840 is referred to, as if it would have governed the result had the case been similar to that of *Kelly* agt. *McCormick*.

The 302d section of the Code, which is referred to, declares that disobedience of the order of *the judge* may be punished by *the judge* as for a contempt. We are authorized to read this section as if the clause before noticed of the 27th section were added to it: as if it read by *the judge*, or by one of the judges in the first judicial district, continuing the proceeding.

In our opinion, the objection raised by the demurrer, that Judge CLERKE had continued the proceeding commenced before Judge DAVIES, and made the commitment under it. is wholly untenable.

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3d. It is next urged, that the orders, or some of them, made upon the supplementary proceedings, were made at special term, as orders of a court, not of a mere judge vested with special powers.

This question must depend as to the fact, upon the statement of the answer. That is, that the order of the 20th of September, and that of the 11th of October, (both of Justice DAVIES,) and that of the 16th of December, made by Justice CLERKE, were made by the said justices "*while sitting at special term, and also at chambers.*" The case of *The Knickerbocker Bank* (19 *Barbour R.* 602) furnishes an answer to this objection. Let it be assumed that the title of the order was at special term, and that it was made while the judge was actually engaged in a trial, in an interval of it. The case is amply sufficient to show that such a technicality, so destitute of all justice or substance, cannot prevail.

4th. It is next insisted that the order of Justice CLERKE of the 16th of December, 1856, was void, because it directed the sheriff "to bring the party before one of the justices of the court, at a special term of the court to be held, at &c., on &c."

The place, the day and the hour are sufficiently designated.

In the case of *Henry D. Smethurst*, in this court, (2 *Sandf. R.* 724,) upon *habeas corpus*, Justice HARRIS had made an order in a supplementary proceeding. The party appeared, and the examination was partly had. Upon his refusal to proceed, an attachment was issued by which the sheriff was to have the party, *before the judge, at his office in the city of Albany*, on a certain day. The objection was made that the attachment was void on this ground. It should have been at special term. (2 *R. S.* 534.)

Justice MASON held, after referring to section 302 of the Code and the Revised Statutes, that the latter vested the power of punishing only in courts of record, and attachments necessarily were returnable before the court. A judge under the Code had the power and could not exercise it, unless the party was brought before him. No power was given to the court

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to punish for the contempt of the order of the judge. The objection was overruled.

There is no reason to conclude from this case, that had Judge HARRIS's attachment been returnable before himself at special term in the capitol or city hall at Albany, on the day fixed, it would have been held void.

The point was that the party was to be brought, not before a court but before a judge. In what place, or position of duty that judge was then found, if time and place where he was to be found are specified, does not seem material.

This idea followed out and applied to the present case, (as it is stated in the answer,) appears to us to govern it. The order of Justice CLERKE, of the 16th of December, for the attachment, was by him as a justice, not as the court. The writ of attachment was signed by the said Justice CLERKE, and attested by the seal of the court. When such a writ is process by the court, it is witnessed in the name of the chief or presiding justice, and attested by the clerk. The subsequent commitment was by the said Justice CLERKE, sitting as aforesaid, that is, "at special term and not at chambers." In short, no act or order was formally made, or directed or intended to be made, or by necessary construction made, or to be made by the court.

The fair legal construction, as well as the plain good sense of the whole of these proceedings, is this. The orders and process were made and allowed by a judge acting under a statutory power delegated to him, and in the first circuit to any judge who could act in his place for the continuing the proceeding. There is plainly nothing done by a court, which was referred to a court to be done, or which could only be done by a court.

The officer had jurisdiction in every instance, of every order and every process, through these proceedings. His exercise of the power when even sitting in court, could not rob his act of its legal character. He had the capacity to do the act, at any place which he had distinctly prescribed. It would be trifling to say, that his fixing it to be done, when he or another judge

who could perform it, was sitting at a special term, should render it utterly void.

Therefore, when the judge directing the process to issue, has jurisdiction, when any judge of the same court who is found at the place designated, on the day specified, has jurisdiction, when place and time are distinctly pointed out, the mere fact that the party is to be brought before the judge when holding a court at special term, does not render the proceeding or process void. The order of special term overruling the demurrer to the answer, must be affirmed, with costs.

SUPREME COURT.

SAMUEL M. PRATT and others agt. THEODORE CONKEY.

In an action for the recovery of money, where an attachment has been issued, the plaintiff is not entitled to recover an extra allowance upon his demand, under § 308 of the Code, where the defendant has, before judgment, *tendered* the amount of damages and costs then due the plaintiff.

It is only upon the *recovery of judgment* that the plaintiff is allowed an additional per centage. And where the defendant, in an action of this kind, has made a tender before judgment, the plaintiff cannot *proceed to judgment* so as to entitle himself to such extra allowance. (*See Thurston agt. Marsh*, 14 How. 572.)

Erie Special Term, July, 1857.

APPLICATION for the per centage allowance of costs under section 308 of the Code as recently amended. The action was for the recovery of money. An attachment was issued, and the property of the defendant was attached. The defendant appeared, and upon giving bond, the property was released, and before judgment was recovered, he tendered the sum to which the plaintiff was entitled for damages and costs, other than the per centage, as specified in section 308 of the Code as amended by the act of April 17, 1857. The plaintiffs insisted

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that they were entitled to the per centage, and the defendant, that they were not so entitled, as there had been no *recovery of judgment*. The question was submitted by stipulation.

BOWEN & ROGERS, *for plaintiffs*.

L. LOCKWOOD, *for defendant*.

MARVIN, Justice. In my opinion, the plaintiffs have no right to the per centage claimed. The action was for the recovery of money. By section 308, before the recent amendment, the court was authorized to make an allowance in certain cases, among which, were those in which a warrant of attachment had been issued. As now amended, the per centage is given without any application to the court. But *when* is it given? under what circumstances? The allowance might be made by the court "*upon the recovery of judgment*," and the same qualification or limitation still remains in the section as amended. It is then only "*upon the recovery of judgment*," that the plaintiff is entitled to an additional allowance by way of per centage.

In *New York Fire &c. Insurance Co. agt. Burrell and others*, (9 *How. Pr. R.* 398,) an extra allowance was given in a *mortgage foreclosure suit* when a tender had been made before judgment. The learned justice took that case out of the provisions of the Revised Statutes relating to the tender before trial, in actions at law, of the plaintiff's demand with the costs. (2 *R. S.* 553.) Without remarking upon that case, it is enough to say it is not applicable to the present case. Here the action was for the recovery of money only, and I can see no good reason why this provision of the Revised Statutes does not apply. It is clear, so conceded in the case cited, that the plaintiff cannot have the allowance unless he has obtained judgment.

Suppose the defendant immediately after his property is attached, desires to pay the demand and costs, should he not be permitted to do so? Can the plaintiff say you must pay the *per centage*, or I will proceed to judgment, and retain the

Banks agt. Van Antwerp and wife.

property attached? I think he cannot do this. By § 322, it is provided that upon the settlement before judgment, of any action mentioned in § 304, no greater sum shall be demanded as costs, than at the rates prescribed by that section. The present action is one of those mentioned in § 304. It may be said that a defendant can never *compel* a *settlement* of the action; and this may be so, but if the provisions of the Revised Statutes referred to, remain in force, he can protect himself by a tender from any further liability to pay interest or costs. In my opinion, the plaintiff is not entitled to a per centage upon the demand, except "upon the recovery of judgment," and in a case like the present he cannot entitle himself to the per centage by proceeding to judgment.

SUPREME COURT.

DAVID BANKS agt. PETER VAN ANTWERP and wife.

In an action to foreclose a mortgage of \$3,000, after nine years of regular payment of interest, the defendant interposed the defence of *usury* on this wise: That the bond and mortgage were dated on the 1st of August, 1846, but were not, in fact executed, nor the principal sum of money borrowed, received by defendant, until the 24th of August aforesaid; and that the plaintiff did thereby reserve to himself, for the loan, fourteen dollars above the lawful rate.

The question was, whether such a transaction (the money, probably, during the time, being set apart in bank for the loan), one of every day occurrence, not in Wall street, but among legal conveyancers, constituted in law a misdemeanor, or in other words, *usury*.

Held, that the legislature of 1837, whatever may have been their views of public policy, did not intend to enact an absurdity, not to say atrocity, such as the present defence implied. Judgment for plaintiff, with costs.

New-York Special Term, November, 1857.

ACTION commenced for the foreclosure of a mortgage, to which was interposed the plea of *usury*; which the answer declared consisted in the following state of facts: That V. A.,

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the mortgagor, had signed and executed the bond and mortgage on the first day of August, but that the money borrowed was not received by him until the 24th of August; upon which plaintiff moved for judgment on account of the frivolousness of the answer.

FRANCIS S. BANKS & E. ELLERY ANDERSON, *for pl'ff.*
S. D. JAMES, *for defendants.*

ROOSEVELT, Justice. Usury, as a defence, standing upon the same footing, in principle, as an action for the recovery of a penalty or forfeiture, the party setting it up must aver, clearly, every particular necessary to such a recovery, and must distinctly negative every supposable fact, which if true, would render the transaction innocent or lawful. In the present case the defendants allege that the mortgage sought to be foreclosed, although dated on the first of the month, was not, in fact, executed until the 24th of August, 1846: that it was made to secure the principal sum of \$3,000, loaned to the defendant Van Antwerp, on the 24th of August, 1846: that it was so dated on the first of the month for the purpose of reserving a greater rate of interest than seven per cent.; and that the plaintiff did thereby reserve to himself, for the loan, fourteen dollars above the lawful rate.

There is no averment, it will be observed, that the fourteen dollars, which constitute the grievance of the offence charged, were ever exacted, or paid, and no interest is now claimed as due for the nine years prior to 1855. The defendants, in effect, admit that the eighteen installments of interest, whatever they were, accruing prior to that day, were satisfactorily arranged and paid. The idea of a recovery, therefore, is clearly an after thought, and savors strongly of the nature of what the law denominates "*stale demand*," and which the courts, especially when sitting in equity, invariably discharge. Besides, the defendants' answer, so far as it alleges facts, and not inferences, may be perfectly true, and yet the loan may have been, as it possibly was, engaged, and the money actu-

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ally set apart in bank in the first days of the month, the intermediate three weeks being devoted to the preparation of the papers and the examination of the title. The question then is, does such a transaction—one of every day occurrence—not on Wall street, but among legal conveyancers—constitute in law a misdemeanor? for the same statute, the one passed in 1837, which is invoked to make it void as a contract, if applicable, equally makes it punishable with fine and imprisonment, as a criminal offence. In other words, the act done, if void, is for the same reason criminal; and if not criminal, is for the same reason not void. Can any one, then, I repeat, imagine that the legislature intended that dating a bond on the day of the loan was to be punished with imprisonment, if the money, although actually engaged, and actually in, and kept in bank, was not actually paid over till the expiration of the usual time allowed or required for the examination of the borrower's title? and that the offence, then, was to be deemed of such a heinous character that, unlike other cases of penalty and forfeiture, which are required to be prosecuted (if at all) within three years, this may, in effect, be prosecuted within nine or even ninety years after alleged commission? It is the practice, I am aware, to underrate the intelligence and good sense of our legislative bodies. The practice, however, has been considered as demonstrating neither the good sense nor the intelligence—certainly not the good taste—of those who indulge in it; courts, at all events, may be excused for not pursuing it.

I shall assume, therefore, until otherwise instructed, that the legislature of 1837, whatever may have been their views of public policy, did not intend to enact an absurdity, not to say atrocity, such as the present defence implies.

Judgment for the plaintiff, with costs.

Derby agt. Hannin.

SUPREME COURT.

DERBY agt. HANNIN.

The only mode of reviewing justices' judgments since the Code is by *appeal*. And by § 353, the *grounds* upon which the appeal is founded must be stated in the *notice of appeal*. And by § 354, this notice of appeal must be served on the justice, and on the respondent, within twenty days.

The statute, which must be fully complied with, requires that the notice of appeal must not only be served, but must state the *grounds upon which the appeal is founded*, thereby making these grounds of appeal jurisdictional facts, upon which the whole proceeding of appeal is based.

Therefore, the review of the proceedings of the justice, brought up on appeal, must be limited and confined to the precise points made, and exceptions taken or specified in the notice of appeal. And these specifications are the grounds of the appeal, which are required to be stated in the notice.

A specification in a notice of appeal, that "the judgment is clearly against the law and evidence in the case," is not a sufficient specification as a ground of appeal. It is too vague and general.

Although the justice's return may show errors sufficient to reverse the judgment, if properly raised and presented for decision, yet if these errors are not specified in the notice of appeal, the judgment will be affirmed, if other errors, though insufficient, are stated in the notice. But where the notice of appeal contains no ground of error, the appeal will be *dismissed* for want of jurisdiction.

Seventh District General Term, Sept., 1857.

APPEAL from a judgment of a county court, affirming the judgment of a justice.

This action was commenced in a justice's court; and on trial of the cause before the justice and a jury, a judgment was rendered in favor of plaintiff. From this judgment the defendant appealed to the county court of Wayne county.

The defendant's notice of appeal stated four grounds of appeal, the fourth of which was,—“The judgment is clearly against the law and the evidence of the case.” Two of the others were abandoned on the argument, and two new grounds were brought forward. The two remaining grounds originally stated in the notice were decided in the county court to be untenable; and the court refused to consider the grounds

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of appeal suggested for the first time upon the argument, holding that they could not be raised under the fourth specification in the notice, because that specification was too vague and general to entitle the appellant to urge objections under it; and that they could not be raised independent of the notice, because the appellant must be confined to those grounds which were set forth in his notice.

C. D. LAWTON, *for the appellant.*

J. WELLING, *for the respondent.*

By the court—E. DARWIN SMITH, Justice. In this case, the justice's return shows several errors for which the judgment ought to have been reversed by the county court if the questions were properly raised and presented for its decision. The county judge has, however, affirmed the judgment of the justice upon the express ground that the errors in question were not specified in the notice of appeal, and were not for that reason proper matters for consideration by that court. The question thus presented is one of much importance.

The only mode of reviewing justices' judgments, since the Code, is by appeal, under chapter 5 of title 2, entitled "Of Appeals in Civil Actions." This appeal is held in *Whitney agt. Bayard* (2 *Sandf.* 634) to be a mere substitute for the certiorari, to bring up the judgment for review. Section 353 is as follows: "The appellant shall, within twenty days after judgment, serve a notice of appeal, *stating the grounds upon which the appeal is founded.*" By section 354, this notice of appeal must be served on the justice within the twenty days, and on the respondent. The service of this notice is indispensable to perfect the appeal. (7 *How. Pr. R.* 108; 1 *C. R.* 53.)

The statute obviously must be fully complied with. The notice must not only be served, but it must state the *grounds upon which the appeal is founded.* If the notice must state these grounds to perfect the appeal, they are in the nature of jurisdictional facts, upon which the whole proceeding of appeal is based. To give practical effect to this section, or to this

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requirement of the statute, I think we must hold, as the county judge has done, that the review of the proceedings of the justice, brought up upon appeal, must be limited to the grounds of appeal stated in the notice;—otherwise, the provision is entirely nugatory. If any sort of grounds may be stated in the notice, and the party need not be confined to them in the argument in the county court or here, the provision is a very useless one, and answers no substantial purpose whatever. But worse than that, it is deceptive and illusory. It is calculated to deceive and mislead the opposite party and the justice. Before the Code, the party applying for a certiorari to review the proceedings before a justice of the peace, was required to make an affidavit setting forth the substance of the testimony and proceedings before the justice, and the grounds upon which an allegation of error was founded.

In *The People agt. The Suffolk Common Pleas* (18 Wend. 550), in a case where no "grounds upon which the allegation of error was founded," were stated in the affidavit, the court held it defective, and decided that the county court should have quashed the certiorari. BRONSON, J., says, "When it appears from the affidavit that questions concerning the regularity of the proceedings, the admissibility of evidence, or the like, were made and decided on the trial, that will be a substantial compliance, without specifying, at the close of the affidavit, the particular grounds of error." Now, under the present system, these grounds must be stated in the *notice of appeal*. The notice of appeal is a substitute for this affidavit. As first passed, and until amendment of 1852, the Code required the party seeking to appeal to make, or cause to be made, an affidavit "stating the substance of the testimony and proceedings before the court below, and the grounds upon which the appeal is founded." Under this section, as it stood, it was held in *Thompson agt. Hopper*, by the county judge of Oneida county (1 C. R. 103), that unless this provision of the Code is complied with, the appeal must be regarded as irregular, if not wholly void; and in the case of *Williams agt. Cunningham* (2 Sandf. 652), the superior court of New-York

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dismissed an appeal because the affidavit did not specify any particular grounds on which the appeal was founded; and in a subsequent case, *Sullivan agt. McDonald*, the same court dismissed another appeal for the same reason (2 *Sandf. S. C. R.* 632, *note*). Both of these decisions proceed upon the ground that the specification in question was essential to the jurisdiction; and so it clearly must be, if no grounds are stated. Where, as in this case, some grounds are stated, the court must have jurisdiction of the case; but I have no doubt it was the obvious intent of the section, and concurs with the general policy of the Code in regard to all proceedings for the review by one court of the proceedings of an inferior court, to confine such review to the precise point made and exceptions taken or specified in the notice of appeal.

I agree, too, with the county judge in the opinion that the fourth specification in the notice of appeal, "that the judgment is clearly against the law and the evidence in the case," is not a sufficient specification. It is too vague and general. It gives no notice of the real ground of the appeal.

The party appealing, as was said by the superior court in 2 *Sandford*, 632, "must put his finger on the point relied upon, or distinctly inform his adversary on what grounds he alleges there is error in the judgment." It is clearly right that the party appealing from a judgment should distinctly take his ground when he appeals, so that the opposite party, if in error, may abandon his judgment and stop the further prosecution of the suit, and so that if it goes on, the justice may see and know to what point he is called upon to make return. It is in analogy with all the judicial proceedings under the Code to make the parties take their ground and make their objections and exceptions in the first stages of the litigation, that the errors complained of may be corrected, when practicable, and the attention of the court of review be chiefly directed to distinct points of law or evidence fairly presented and expressly decided by the court below.

I think the decision of the county judge right, and the judgment of the county court should be affirmed.

SUPREME COURT.

The People *ex rel.* JOHN S. GILES *agt.* AZARIAH C. FLAGG.

The fact that witnesses of plaintiff, on the trial of a cause, testified untruly, is not of itself sufficient to justify a court in finding, on a motion for an extra allowance under § 308 of the Code, that the prosecution was unreasonably or unfairly conducted.

The prosecution or defence of an action should not be deemed to be unreasonably or unfairly conducted because testimony which is untrue occurs in it.

To authorize such a conclusion, it should also appear that the party introducing the evidence, knew of its untruthfulness.

Whether in every case the testimony of witnesses to facts, apparently within their knowledge, found by the jury to be untrue, should, for the purpose of an extra allowance, be deemed to be willfully false, *quere?*

In an action of *quo warranto*, brought to try the title to an office, an extra allowance by way of costs to the prevailing party, is not authorized by the Code, § 308.

The provision of the Code in limiting the amount of an allowance to a per centage of the claim, is necessarily confined to cases where the claim is to money, or property having pecuniary value, which can be ascertained. It does not apply to a case where an office is the subject of the claim.

The salary attached to an office, is not the thing claimed within the meaning of that section; the salary being merely an incident to the thing claimed, and only to be had as a compensation for services to be rendered, the per centage cannot be given on the amount of it as being the claim made by the plaintiff.

New-York General Term, November, 1857.

Present, MITCHELL, ROOSEVELT and PEABODY, Justices.

THIS is an appeal from an order of the special term, making an allowance by way of costs to the defendant of \$450.

The action was in the nature of a *quo warranto*, and was brought to try the title to the office of comptroller of the city of New-York.

A. L. JORDAN, *for motion.*

S. J. TILDEN and A. H. GREEN, *opposed.*

By the court—PEABODY, Justice. The allowance can only be made under § 308 of the Code, which provides that an al-

lowance of not more than ten per cent. on the recovery or claim for an amount not exceeding \$500, and not more than five per cent. for any additional amount, may be made in any case where the prosecution or defence has been *unreasonably or unfairly* conducted.

If a prosecution or defence has been unreasonably or unfairly conducted, an allowance may properly be made. That allowance, however, must be within a certain limit, and must not exceed the rate per cent. of the amount of the claim or recovery.

Two things then must be judicially ascertained to warrant the allowance of any particular sum :

First, the conduct of the prosecution or defence, and that it was unreasonable or unfair.

Second, the amount of the recovery or claim.

And first, has this suit been unfairly or unreasonably prosecuted ? The thing which the plaintiff sought to recover in this suit, was the office of comptroller of the city of New-York. The defendant was in the office performing the duties of it, and the plaintiffs herein claimed that he was wrongfully there, by reason of an erroneous return of the number of votes received by him from a certain district of the city. They also claimed that the relator was the person duly elected, and that the error made in the returns being corrected, these facts would appear. On the trial, the plaintiffs called several witnesses who swore to the condition of the votes claimed by them, according to whose testimony, the defendant was not entitled to the office, and the relator was duly elected to it. These witnesses were contradicted, however, by those of the defendant, and as the result of the suit proved, their testimony was shown to be untrue in fact. The untruthfulness of the testimony of the witnesses for the plaintiff, is the principal ground of the charge of unfairness or unreasonableness in the conduct of the prosecution. It is insisted that the testimony was intentionally untrue, and hence that the prosecution was unfairly conducted. Of course, the argument is, that the plaintiffs, or those having charge of the prosecution, knew, or at least be-

lieved, this evidence to be untrue, and that the conduct of the prosecution was unfair in attempting to accomplish their purposes by the use of it. The testimony may have been all untrue in point of fact, and the *witnesses* even have been entirely free from intentional untruth. The witnesses may have been guilty of intentional untruth, and the party entirely innocent of it; and to make the facts applicable to this question, the three propositions must probably be established. 1. The falsity of the testimony. 2. The intent of the witnesses to testify falsely. 3. The guilty knowledge or complicity of the plaintiffs.

The falsity or untruth of the testimony, was found by the jury, it is said, and for the purposes of this motion, perhaps, the finding should be deemed sufficient to establish this first proposition. The intent of the witnesses is the next. The facts to which they testified, were apparently, and as they said, within their own personal knowledge, and if it be impossible beyond a reasonable doubt that they could have erred innocently, respecting them, we must consider their guilty intent proved; otherwise not. In my judgment, it is not difficult to believe that they may have made an unintentional mistake, which would leave them innocent in their statements, even assuming their statements to be erroneous; but it is not necessary to dwell on this point, as the result of this motion does not depend on it.

The third proposition necessary to the support of this point is, the guilty knowledge or complicity of the plaintiffs or their agents; and the proposition is so extravagant that I shrink from the consideration of it. The plaintiffs themselves (the state) of course could not have been guilty either of subornation of perjury or as accessories to that crime, but their agents and those having charge of the prosecution could have been; and to authorize the finding in the favor of the defendants on this motion, must have been. This is the necessity of the argument of the defendant. If the prosecution was unfairly conducted in the use of that testimony, because it was untrue, it must have been so for the reason that the prosecution knew

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its untruth ; for the use of it would not otherwise have been unfair. The prosecution, as I have said, was necessarily conducted by the attorney-general and such counsel and agents as he might call to his aid ; in this case, gentlemen of eminent position, both professionally and personally. To say nothing of the elevated character of these representatives of the state, a momentary glance at the matters themselves which were the subject of proof and disproof, may not be unimportant ; they are certain facts and circumstances attending the canvassing of the votes and preparing the returns of them for a particular district of this city, at or about the time of the election in 1855. There is not a word of evidence given or offered, to show that any mortal connected with the prosecution had, or could have had, any personal knowledge of any one of these matters ; and if we are to find that any one had, we must find it from the intrinsic probability of the case ; and what is the probability that these gentlemen had personal knowledge of those scenes ? As I have said, there is no external evidence on the subject ; there is none internal, arising from the nature of the facts themselves, and I am not familiar with any principle which authorizes a legal intendment of the fact.

But it may be said that although the people in their sovereign character are the plaintiffs, and their counsel are by law charged with the conduct of their litigations, still it is the practice to allow the relator to conduct a suit of this kind, and that we ought, in the absence of evidence, to take cognizance of this fact. Suppose, for the sake of the argument, that we do assume this suit to have been conducted by the relator instead of the plaintiffs, in what respect is the above reasoning inapplicable ? All that we know of the relator from this case is, that he was a candidate and had a very large vote for the office of the highest pecuniary trust connected with the government of the city of New-York ; and is there any more reason to believe that the witnesses introduced by him committed perjury, or if they did, shall we assume, in the absence of all evidence on the subject, that he or his agents in con-

ducting this litigation knew it and were guilty of moral perjury in the use of their testimony with such knowledge?

Are the facts themselves of a nature to render it at all probable, in the absence of all evidence on the subject, that he or his agents in this suit knew whether this testimony was or was not true? How could they? There is not the least probability, not to say evidence, (which alone would justify action of the court,) that he actually *knew* anything on the subject one way or the other. There is no good reason for imputing any complicity with this false testimony to the prosecution, by whomsoever conducted—none whatever more than occurs in every case where evidence is introduced which the jury decline to believe, which is in effect finding that the weight of evidence is against it. On the contrary, the fact that the witnesses on which the plaintiffs relied, testified untruly, goes to explain the error of the plaintiffs, shows how they were misled into bringing the suit by erroneous information in the premises, and tends strongly to free them of all suspicion of wantonly bringing it without sufficient grounds to justify it in their judgments. It *justifies* them in bringing it, and I see nothing in it at all tending to inculcate either the plaintiffs or the relator, whichever may have had charge of the conduct of this prosecution, but quite the reverse; its tendency is manifestly to exculpate the practical plaintiff, whoever he may have been. The allowance if made, would, to be sure, be recovered against the relator, but he is not therefore to be held to a different measure of responsibility for the manner of conducting this suit. The state also is liable for it if the relator make default in payment, or rather, is in the habit of paying in such cases.

Second. The amount of the claim in this case is not easily to be ascertained, and we see no way in which it can be. The allowance must be not more than a proportionate amount of the claim. Ten per cent. or five per cent. of the amount or value of the office of comptroller for a certain time, is not a matter which we know how to compute. The amount of the salary for the time can be ascertained to be sure, but that is not

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the principal object of the action. The office is what is claimed, and the salary is but an incident; and even that is to be had only as a compensation for services to be rendered. No rate per cent. can be fixed in a suit of this kind, and the statute authorizing an allowance is therefore not applicable. It is only applicable in a suit for money, or something having pecuniary value, upon which the rate allowed can be calculated.

The order appealed from must therefore be reversed with costs.

SUPREME COURT.

THE BANK OF KINDERHOOK agt. JOHN JENISON.

ANDREW BARHIGHT agt. THE SAME.

JARED BEST agt. THE SAME.

A statement on confession of judgment, was made by the defendant on this wise:

"Judgment is hereby confessed in this cause for the sum of \$2,540.85. This confession is for a debt justly and legally due to the plaintiffs, arising upon the following facts: 1. A note for \$400 and interest and protest fees, dated February 28, 1855, discounted by said bank and now owned by them." There were six more notes stated in the same way. The aggregate amount of the several notes exceeded by several hundred dollars, the amount of the confession.

Held, that this statement was entirely insufficient. Whether the defendant was liable on these notes as principal debtor or surety, or whether he originally became liable, or had become liable by some arrangement subsequent to the discount, could never be discovered from the statement. The statement should have shown how the defendant was connected with, and became liable for the payment of these notes. (*The particularity required in such a statement by the case of Stebbins agt. The East Society of the M. E. Church, Rochester, 12 How. 410, disapproved.*)

Columbia Special Term, April, 1857.

MOTION to set aside judgment by confession. On the 20th day of March, 1856, a judgment by confession in the first entitled cause was entered in the office of the clerk of Columbia, for \$2,540.85, besides costs.

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The statement, upon which the judgment was entered, was as follows: "Judgment is hereby confessed in this cause for the sum of \$2,540.85. This confession is for a debt justly and legally due to the plaintiffs, arising upon the following facts:—

"1. A note for \$400 and interest and protest fees, dated February 28th, 1855, discounted by said bank and now owned by them.

"2. A note for \$200 and interest and protest fees, dated March 14th, 1855, discounted and now owned by said bank.

"3. A note of \$600 and interest and protest fees, dated March 1st, 1855, discounted and owned by said bank.

"4. A note of \$200 and interest and protest fees, dated April 18th, 1855, discounted and owned by said bank.

"5. A note of \$400 and interest and protest fees, dated June 27th, 1855, discounted and owned by them.

"6. A note for \$1,150 and interest and protest, dated November 18th, 1855, discounted and owned by said bank.

"7. A note for \$150 and interest, dated March 14th, 1855, discounted and owned by said bank.

"JOHN JENISON."

On the 24th of March, 1856, an execution was issued upon this judgment to the sheriff of Columbia, by virtue of which he levied upon the personal property of the defendant.

On the 24th of June, 1856, a judgment was recovered in the second action above entitled, upon issue joined and a trial at the circuit, for \$729.12. The judgment in the third above entitled suit was recovered by action, on the 13th of January, 1857, for 101.60. On the 11th of February, 1857, executions were issued upon both these judgments to the sheriff of Columbia, and on the 17th day of the same month, the personal property of the defendant was sold by a deputy of the sheriff, who held all three executions, and upon such sale the amount realized was \$647.53. A motion was made on behalf of the plaintiffs in the second and third judgments to set aside the *first judgment*, and that the sheriff be directed to apply the

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proceeds of the sale upon the executions issued on those judgments.

HENRY HOGEBOOM, *for motion.*

THEODORE MILLER, *opposed.*

HARRIS, Justice. To authorize a judgment by confession to be entered, a verified statement showing the origin of the indebtedness, is necessary. In this case, I do not think the facts are sufficiently stated. Seven notes are mentioned; their dates and amounts are specified, and it is stated that they had been discounted by the bank, and that at the time of making the statement, the bank was the owner of these notes. The aggregate amount of the notes exceeds by several hundred dollars the amount of the confession. But it does not appear what connection the defendant has with these notes. It is not stated that he is either maker or indorser of the notes, or, indeed, that he is in any way liable for their payment. It was not enough for the defendant to state that the notes had been discounted by the bank, and that they were still owned by it. He should have shown how he became liable for their payment, or, in the language of the statute, "the facts out of which his indebtedness arose." Enough should have been stated to enable those who might be affected by the judgment to see how the defendant had become indebted, and that the sum for which the judgment was confessed, was justly due from the defendant to the plaintiff. These are requisites which cannot be dispensed with, without defeating the object for which the statement is required.

I am not disposed to insist upon a construction of this statute which shall have the effect to prevent its practical use as a convenient and safe mode of entering judgment by consent. Some of the reported decisions, in my judgment, have this tendency.

In *Stebbins* agt. *The East Society of the Methodist Episcopal Church of Rochester*, (12 How. 410,) it was stated that the plaintiff had lent and advanced money to the defendant to the

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amount for which the judgment was confessed. The object for which the money had been borrowed by the defendant was stated. It was further stated that the money thus borrowed had been used for the purpose of paying the debts of the defendant, and that no part of it had been repaid to the plaintiff. It was held, that it should further have appeared from the statement whether the money had been lent or advanced at one or several times, and when and in what sums. The court went still further, and held that it should have been stated to whom the defendant owed the debt, for the payment of which the money was borrowed, and how the defendant became so indebted. In that decision I could not have concurred. The statement showed that the defendant was indebted for money lent and advanced. This I should have regarded as a sufficient compliance with the requirement that the origin of the indebtedness should appear. It also showed that no part of the money so lent and advanced had been repaid. This I should have regarded as a sufficient compliance with the requirement that it must be shown that the sum confessed is justly due.

So, in *Hoppe* agt. *Donaldson*, (12 How. 141,) the origin of the indebtedness was stated to be for goods and merchandise previously delivered to the defendant. The statement was loose and carelessly framed. I am not surprised that it should have been held to be fatally defective, and yet I should have been inclined to regard it as a substantial compliance with the statute.

But, in the case under consideration, although it sufficiently appears from the affidavits read upon the hearing, that the notes specified in the statement were the notes of the defendant, and were discounted by the bank for him, I am constrained to hold the statement to be entirely insufficient in this respect. The most that can be said of it is, that it shows that the notes specified had been discounted by the bank for *some one*, and by implication, perhaps, that in *some way*, the defendant is liable for their payment; but whether as principal debtor or surety, or whether he originally became liable, or has be-

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come liable by some arrangement subsequent to the discount, could never be discovered by anything contained in the statement. The judgment, therefore, must be set aside, and the proceeds of the sale applied upon the other executions. I think, too, the plaintiffs in the other judgments are entitled to the costs of this motion.

SUPREME COURT.

WILSON EYRE and LOUISA L. L., his wife, agt. EDWARD V. HIGBEE and FANNY L., his wife.

The receiver of a letter has a *property* in it. And the writer of a letter has a property in it, but such only as will enable him to restrain the publication of the letter.

Therefore, if consent to such publication be given, or no objection to such publication is interposed by the writer, a stranger cannot say that the receiver has no property in the letter, and may not do with it as he pleases.

New-York Special Term, January, 1858.

THE complaint alleges that Tobias Lear, in his life, was the owner and possessor of a large number of letters, addressed to him by General Washington, from 1790 to 1799: that said Tobias Lear continued to possess the same until his death, in 1816: that they remained in his family until the month of September, 1856, when they were delivered to Mrs. Higbee for a special purpose, by the widow of Tobias Lear.

The plaintiff Louisa Lincoln Lear Eyre, is the granddaughter of Tobias Lear, and she claims these letters, which have been collected and bound into a volume, as her property.

The complaint avers that neither of the defendants have ever been authorized by the widow of Tobias Lear to take possession of said letters. The complaint also avers that the plaintiff Louisa Lincoln Lear Eyre, is now the sole owner of the said volume of letters, and has demanded the same of the

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defendants, who have refused to deliver it up to her. To this complaint the defendants demur, upon these grounds :

1. Because the representatives of General Washington are not made parties.
2. That the lapse of time since the death of Tobias Lear forms an equitable and legal bar to the claims of the plaintiffs.
3. Because the complaint does not state facts sufficient to constitute a cause of action.

E. W. STOUGHTON, *for defendants.*

H. A. CRAM, *for plaintiffs.*

DAVIES, Justice. I shall confine myself, in the disposition of this demurrer, to the question so ably discussed on the argument, whether the recipient of a letter has any property therein.

If Tobias Lear, as the person to whom these letters were addressed, had any property in them, then the averment of the complaint, and which is admitted by the demurrer, that the plaintiff Mrs. Eyre is now the sole owner of the letters, would make that property hers.

If Lear had any property in the letters, it follows, from the admissions in the pleadings, that that property is now vested in his granddaughter.

I think the rule laid down by Lord HARDWICKE, in the case of *Pope* agt. *Curt* (2 *Atk.* 342), has always been regarded as the correct one. He says: "I am of opinion that it is only a special property in the name. Possibly the property in the paper may belong to him, but this does not give a license to any person whatever to publish them (the letters) to the world, for, at most, the receiver has only a joint property with the writer."

These views are re-affirmed and adopted in the very able and learned opinion of Mr. Justice DUER, of the superior court, in the case of *Woolsey* agt. *Judd* (11 *How. Pr. R.* 49).

I have not been able to find, in all the cases which I have

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examined, anything in conflict with them. Lord ELDON says, in *Gee agt. Pritchard* (2 *Swans.* 442), "I think the decisions represent the property as qualified in some respects; that by sending the letter, the writer had given, for the purpose of reading, and in some cases of keeping it, a property to the person to whom the letter was addressed, yet that the gift was so restrained, that although the purposes for which the letter was sent, the property was in the sender. * * *

I doubt whether the court has proceeded so far as to decree the restoration of letters, for the principle on which it interferes, recognizing a joint property in the writer and the person to whom they are addressed."

I think the principle deducible from all the cases is, that the writer has such a property, and such only as will enable him to restrain the publication of the letters, and that if consent to such publication be given, or no objection to such publication is interposed by the writer, a stranger cannot say that the receiver has not property in the letters, and may not do with them as he pleases.

In the case referred to *supra*, Justice DUER observed that "the receiver of a letter may, indeed, publish it, where its publication is shown to be necessary for the vindication of his rights or conduct, but this license has never been extended to a person whose possession of a letter or a copy of a letter, as acquired without the consent of the writer or receiver, is wholly unlawful."

It follows, I think, that the receiver of a letter has a property in it, and though this case does not call for any adjudication as to the rights of the writer (the defendants making no claim to them under or through him), these rights have been held to warrant the writer, or his representatives, to restrain the publication of them without his consent.

The demurrer must be overruled, with leave to the defendants to answer on payment of costs.

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SUPREME COURT.

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On an application for an order of *arrest*, the affidavits to be presented to the judge must make out a *prima facie* case for the arrest. That is, the judge must be satisfied judicially, upon the force and weight of the evidence produced by the affidavits, that a cause of action exists, and that the case is a proper one for an arrest within the provisions of the Code.

An affidavit for an arrest upon information and belief generally, is clearly insufficient. But some of the material facts may be stated upon information and belief, where the affidavits state the nature, quality and means of the information, so that the judge can be able to see that this belief is well founded, as was held in *Whitbeck agt. Roth* (5 How. P. R. 143.)

Deceit, or fraudulent representations accompanied by damage, constitute a good ground of action in respect to a sale of *real*, as well as personal property.

The Code did not, nor could not abolish the common law, or common law rights. And it is to be regretted that the codifiers should have thought it necessary to abolish the *names of remedies* which were so well defined and understood as to have become almost inseparable from the right of action, and attempted to introduce an entire new nomenclature into the law.

This change frequently leads to doubts and perplexities in cases arising under the provisions of the Code itself. For instance, formerly, in respect to many rights of action, there was an election whether the form of the remedy should be *assumpsit* or *case*; and where in cases of *fraud* the remedy would have or might have been *assumpsit*, an arrest now can clearly be made, for that is an action where "the defendant has been guilty of a fraud in contracting the debt, or incurring the obligation for which the action is brought," &c. (§ 179, sub. 4). But it is not so clear whether the defendant can now be arrested under this subdivision, when the form of the remedy in respect to the fraud would have been under the old system an *action on the case*; as for instance, fraud or deceit in the sale of land.

Whether a defendant can now be arrested in an action for fraud or deceit in the sale of land, must depend upon the construction to be given to the word "*obligation*" in sub. 4, § 179 of the Code, where it says "or incurring the obligation for which the action is brought," &c.

Held, that this clause "incurring the obligation for which the action is brought," was intended to cover cases of fraud in fact, where the remedy was not on the contract in form; where the fraud was committed in some matter of contract under or by virtue of which the plaintiff suing had been deprived of his property. And the word "*obligation*" therein is used in the general sense to include all the cases beyond those which would be embraced in the first clause,

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where the fraud is committed "in contracting the debt for which the action is brought;" where the action would not rest upon the contract, but upon the legal duty. It must be construed, in this connection, as equivalent to *legal liability or legal duty*.

Seventh District, at Chambers, June, 1857.

MOTION to discharge defendant from arrest.

This action was brought by Jesse Crandall against James Bryan. The complaint stated that the plaintiff and defendant agreed to exchange lands, the plaintiff contracting to give a farm in Union, Monroe county, for lands in Barry county, Michigan, which defendant claimed to own; that deeds were duly exchanged, the defendant representing that he had a good title to the Michigan lands, and that they were free from all incumbrances, although there was a squatter on them who had and claimed no title, and would give up possession at once on being paid a small sum for his crops; that plaintiff had ascertained from official certificates and other information that defendant did not own, and had never owned the lands in Michigan, but they were actually occupied by one Sacket, who claimed to own them, and who had a good title upon record. The complaint further stated that the defendant had conveyed the lands in Union, and that the same had by several mesne conveyances, duly recorded, come to the possession of a *bona fide* purchaser, and were, therefore, lost to or could not be recovered by the plaintiff. He claimed to recover in damages the estimated value of the lands in Union or Michigan, with other damages.

Annexed to the complaint were several affidavits tending to show fraud on the part of the defendant, and also an affidavit by one Hall, who was the agent of plaintiff in making the trade, and who swore positively to the representations of the defendant in respect to the Michigan lands, his title, and their situation, as stated in the complaint. He also swore that he had been to Michigan to take possession of the land for the plaintiff, and found the same in the actual occupation of the person named in the complaint, who claimed title thereto absolutely, and that he then and there ascertained from an ex-

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amination of the records of the office of the register of Barry county, and from the official certificates of said register, and from the owner and occupant of the said Michigan lands, one Henry Sacket, and from other sources, and which he believed to be true, that no part of the said land so pretended to be conveyed by said defendant to the said plaintiff was, on December 4, 1855 (which was the date of defendant's deed), or at any other time, owned by said defendant, nor did the said defendant then, or ever, have any title whatever thereto, or any part thereof, but, on the contrary, that said land was then, and had been, for four years or thereabouts, the last past, owned and occupied by one Henry Sacket, and Laura A. Sacket, his wife, or one of them, by a good, valid, and sufficient title, and that said land was then incumbered by good and valid mortgages thereupon, which are valid and subsisting liens thereon, amounting in all to the sum of \$375; that said land was not occupied by a squatter, but by owners, under the title and claim aforesaid, who claimed that their interest in it, and its value, was \$2,000 or thereabouts.

On the complaint and affidavits an order of arrest was granted in the sum of \$3,000.

The defendant now moved, on the same papers, to discharge the order.

G. F. DANFORTH, *for the motion.*

O. H. PALMER, *opposed.*

E. DARWIN SMITH, Justice. If I am entitled to believe the complaint in this action, and the affidavits annexed thereto, on which the order of arrest was made, the defendant has obtained the title to the plaintiff's farm, and deprived him thereof without any consideration, by *fraud* and *false pretences*. Fraudulent representations, or deceit accompanied by damage, constitute a good ground of action in respect to a sale of lands, as much as in respect to personal property. Before the Code, an action on the case for the fraud or deceit would clearly have been sustainable upon the facts set up in the complaint

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and affidavits in this case. (*Whitney agt. Allair*, 1 *Comst.* 308; 13 *Johns.* 325; *Id.* 402; 7 *Wend.* 386; 17 *Id.* 193.)

Two points are made upon the papers on this motion, assuming that a good cause of action is stated in the complaint:

1. That the order of arrest should be discharged, because the complaint and affidavits do not make out by competent proof, or legal evidence, the fact of the fraud.

2. That the Code does not authorize an arrest in such a case, if the fraud be sufficiently established.

Section 181 of the Code provides that the order may be made when it shall appear to the judge, by affidavits of the plaintiff or any other person, that a sufficient cause of action exists, and that the case is one of those mentioned in section 179.

The affidavits to be presented to the judge must make out a *prima facie* case for the arrest. It is said in some cases, that they must be positive as respect the cause of action and the ground on which the arrest is sought. (1 *C. R.* 41; 3 *How. Pr. R.* 265; *Id.* 219.) But this rule is to be construed and applied in a rational manner, and with some degree of qualification in respect to the particular facts and circumstances of each case. The judge is to be satisfied from the affidavits that a cause of action exists, and that the case is a proper one for an arrest within the Code. The statute does not define the proof to be made, except that it be by affidavit; nor does it define or fix the degree of, or extent of the evidence; how near it must come to legal evidence—such as would be required on the trial of the issues; or how much short, if any, it may come of such evidence. Something, doubtless, is left to the judgment and discretion of the judge, in respect to the particular facts of each case, and such was the obvious intention of the legislature. But the judge is not at liberty to exercise anything but a sound judicial judgment upon the force and weight of the evidence produced. He must, as Judge SAVAGE said, in *Smith agt. Luce* (14 *Wend.* 239), “be satisfied *judicially*.”

An affidavit upon information and belief generally, is clearly insufficient; but I agree with Judge EDMONDS, in *Whitbeck agt. Roth* (5 *How. Pr. R.* 143), that some of the ma-

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terial facts may be stated upon information and belief, where the affidavit states the nature and quality and means of the information, so that the judge can be able to see that this belief is well founded; otherwise there obviously could be no arrest in many fit cases, owing to the difficulty of procuring, within the requisite time for the application, as full proof as would be necessary for a final recovery.

In this case, the witness Hall, who proves the essential facts of the fraud, went to Michigan to take possession of the land for the plaintiff, and swears positively that he found one Sacket in possession of the land, occupying it as owner, and claiming to be the owner thereof, and asserting that he had the legal title to it. So far as relates to the occupation and claim of title, this is positive. He also swears positively that he ascertained then and there, by examination of the records of the office of the register of the county of Barry, and from the examination of the official certificates of said register, and from the owner and occupant of said land, naming him, and other sources which he believed, that the defendant did not own, and never had owned, the land in question, but the same belonged to said Sacket at the date of the defendant's deed to the plaintiff, and had for four years.

The witness swears in substance and to the effect that he found such to be the facts on examination at the register's office, and from the official certificates of the register. This is not as certain as the affidavit of the register and the affidavit of the occupant, Sacket, would make it. On the trial this witness cannot, from this examination and information, prove the facts to be established in respect to the defendant's want of title.

But on this motion, and for the purpose of the arrest of the defendant, I think it is sufficient. It is something more than mere information—it is personal examination of the records—personal examination of the official certificates of the registry, and information from the person in actual possession of the land. The judge can see from this statement that the witness applied at the proper quarter or source to learn the facts, and

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that, if he speaks the truth, he was entitled to believe what he states; that the defendant had no title to the land in question. The plaintiff makes as positive proof of the facts to authorize the arrest as he could make in this state, or could make without obtaining the affidavits of the register and of Sacket from Michigan. I do not think he was bound to do so for the purpose of this arrest.

The plaintiff also states in his complaint, that from information derived from the records of the office of the register of Barry county, and from the official certificates of said register, and from other sources, and upon his belief, no part of said land in Michigan belonged to the defendant at the date of his deed thereof. This allegation in the complaint implies that the plaintiff himself also has examined the records, or, certainly, the official certificates of the register in respect to the title of the defendant. The source of his information, too, is thus stated. Taken with the more positive affidavit of Hall, I think the plaintiff makes out a *prima facie* case of fraud for the purpose of the arrest of the defendant.

The remaining question is, whether the Code authorizes an arrest upon the case thus made.

Section 179 of the Code makes five classes of cases of arrest. The order of arrest in this case, if sustainable, must come under subdivision 4 of the section or class, which is as follows: "When the defendant has been guilty of a *fraud* in *contracting the debt* or *incurring the obligation* for which the action is brought, or in concealing or disposing of the property for the taking or detention of which the action is brought." The present action is not one of *debt* or of *contract*, strictly speaking, and the right of arrest cannot be sustained upon the first clause of this subdivision or class of the section. The action is one for *fraud* or *deceit*. It is strictly such an action as would have been called, before the Code, "an action on the case." It is much to be regretted that while the codifiers did not, as they could not, abolish the common law or common law rights, they should have abolished the names of remedies which were so well defined and well understood as to have

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become almost ins. parable from the right of action, and attempted to introduce an entire new nomenclature into the law. It will be many years before the new terms or phraseology which they have introduced will have become defined by the courts so as to possess those elements of stability which should belong to legal language, if it cannot exist in respect to the law itself.

In abolishing imprisonment for debt, in 1831, it was primarily intended to except fraudulent debtors; to exempt from imprisonment in all cases of debt, except where the debt was fraudulently contracted, and except in certain specified cases where debts had been contracted in or grew out of some fiduciary relation, and promises to marry. The act of 1831 provided for the arrest of fraudulent debtors upon the warrant of a judge, and prescribed the proceedings consequent thereupon before the officer. The Code provides for a preliminary arrest in actions, now, for *fraud* in the same manner as in actions of slander or assault and battery. This was the obvious purpose in subdivision 4, above recited.

Formerly, in respect to many rights of action, there was an election whether the form of the remedy should be *assumpsit* or *case*. Where in cases of *fraud* the remedy would have or might have been *assumpsit*, an arrest now can clearly be made, for this is an action where the defendant has been "guilty of a fraud in contracting the debt," &c. But when the form of the remedy, in respect to a fraud, would have been *case*, under the old system, can the defendant now be arrested under the clause aforesaid? The answer to this question depends upon the proper construction of the word *obligation*.

The defendant, I assume, has been guilty of a *fraud*, and that fraud is the basis of this action.

Was he guilty of such fraud in incurring the obligation for which this action was brought? If the word "obligation" means a bond, or sealed instrument, or obligation in writing, as that word was commonly used before the Code, clearly the defendant cannot be arrested, for the action is on no such obligation. The word, I think, cannot have been used in any

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such sense, for that would make this clause of the subdivision entirely superfluous. The previous clause will embrace all cases of fraud "in contracting a debt," whether it was contracted by a bond, or sealed, or an unsealed instrument, or by parol. The word *obligation*, in this connection, we are bound to consider and construe as meaning to include a class of cases not embraced in the previous clause. In most cases of fraud in contracts, the party injured may affirm or disaffirm the contract for the fraud. When he disaffirms the contract, and seeks to recover the property obtained by the fraudulent contract, the action is not brought in form upon the contract, and the defendant in such a case cannot be said to be "guilty of a fraud in contracting the debt for which the action is brought." If the party injured by a fraud cannot rescind the contract and sue for his property immediately—when the property cannot be reclaimed, and hold a defendant to bail—under this clause, "that defendant has been guilty of a fraud in incurring the obligation for which the action is brought,"—a distinction without any reason exists between this case and the one in which the action is in form upon the contract.

I cannot believe the legislature intended any such distinction. They intended to give the right of arrest in cases of *fraud* in getting or obtaining property, or contracting a debt by which a party was injured. It was intended to give the arrest against the person who committed the fraud. Such person is a fraudulent debtor within the intent of the act, in whatever shape the party injured seeks his redress by action. I think the "incurring the obligation for which the action is brought," was intended to cover just such cases—cases of fraud in fact, where the remedy was not on the contract in form; where the fraud was committed in some matter of contract under or by virtue of which the plaintiff suing had been deprived of his property.

The word *obligation*, I think, should in this place and connection be construed as equivalent to the words *legal liability* or *legal duty*. Bouvier says: "Obligation, in its general and most extensive sense, is synonymous with *duty*. In a more

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technical sense, it is a tie which binds us to pay or to do something agreeably to the laws and customs of the country in which the obligation is made." Webster defines *obligation* to be "the binding power of a vow, promise, contract or law, civil, political or moral, independent of a promise; that which constitutes *legal* or *moral duty*, and which renders a person liable to coercion and punishment for neglecting it." The word obligation, I think, in this subdivision, is used in this general sense, to include all the cases beyond those which would be embraced in the first clause, where the fraud is committed in "contracting the debt for which the action is brought;" where the action would not rest upon the *contract*, but would rest upon the *legal duty*; where the law casts a *liability* upon a man guilty of fraud, for which an action will lie. Wherever fraud and damage give a right of action, the law casts a *liability* and creates an *obligation*. In a suit brought to enforce such liability, it may truly be said, using the word *obligation* in the general sense mentioned by Bouvier and defined by Webster, that the defendant has been guilty of a fraud "in incurring the obligation for which the action is brought." In this case the right of action is clear. It is a gross case of fraud. The duty of the defendant to respond in damages is an *obligation*, a *duty*, a *liability*, imposed by the law. And I think, clearly within the intent and meaning of the statute, it is an obligation in respect to which the plaintiff has the right to arrest the defendant in the commencement of the action, that he may be held to answer for such damages as may be recovered.

The use of the word "incurring" favors this construction. It is an inappropriate word in connection with the word "obligation," if the latter word is limited to a case of contract. Men contract *debts*, they *incur* liabilities. In the one case they act affirmatively, in the other the liability is *incurred* or *cast* upon them by act or operation of law. The use of this word shows to my mind conclusively that the legislature intended something beyond *contracts*—something not embraced within the word *debt*. They meant duty or liability incurred from acts of fraud, where the law creates the obligation or

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gives to the party injured the right of redress. They meant to carry out the principle of punishment for fraud to arrest or imprison in all cases where a cause of action arose *from* or originated *in fraud*, whatever might be the form of the action.

The motion to discharge the defendant from the arrest must be denied.

SUPERIOR COURT.

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- When an action is tried before the court, without a jury, and a decision is made disposing of the case, except that a reference is directed to take an account, and an order is entered in conformity to the decision, an *appeal* from such order, to review decisions made at the trial, will be dismissed; they can only be reviewed on an appeal from the *judgment*, which appeal cannot be brought until the account has been taken, and all questions arising upon it, have been disposed of at special term. Until then, the order entered on the final decision made after the trial, does not become a *judgment*, within the meaning of that word as defined by the Code.

The "*judgment*" from which an appeal may be taken to the *general term*, means the same thing as a judgment from which an appeal may be taken to the court of appeals.

General Term, Dec., 1857.

Before BOSWORTH and WOODRUFF, Justices.

• THE plaintiffs move to dismiss an appeal taken by some of the defendants in this action; the notice of appeal states that the appeal is taken from the "judgment order" of the special term herein made, on the 11th of June, 1857, "and from every part of such order." The printed case, on which the motion to dismiss the appeal is made, shows that the action was tried before Mr. Justice DUER: that it is an equity suit: that it was fully heard, and a final decision made, disposing of the whole case, except ascertaining the result of an accounting between some of the parties in respect to matters which are specified in the decision made. The order refers it to Mr. Cambreling to take and state such account.

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This action was brought by the heirs at law of one John T. Champlin, deceased, to obtain a judgment of the court that an instrument of conveyance, dated the 1st of June, 1824, and executed by Champlin and his trustee, Benjamin Bayly, and by which they conveyed an undivided moiety of certain lands to the Farmers' Loan and Trust Company, is a mortgage, and that the heirs at law have, as such, a right to redeem the premises on paying the amount due on such mortgage. The Farmers' Loan and Trust Company having obtained title to the other half of the premises, have sold the whole at private sale, and the defendants, except Anna M. Lewis, who is one of the heirs at law, hold parts of these lands in severalty, and claim to own them in full, under a title derived from the Farmers' Loan and Trust Company, as their immediate or remote grantors.

The court, at special term, held the instrument of conveyance to be a mortgage, and that the plaintiffs, as heirs at law of Champlin, had a right to redeem, and that on paying the sum which the account to be taken might show to be due on the mortgage, they would stand seized in fee simple, in their own right, of an undivided portion of the whole of the land described in the mortgage. The proportion of each heir is stated in the order appealed from and determined by it. The whole merits have been disposed of, so far as the court, at special term, intended to decide one way or the other, in respect to any claim of either party to the action. No question is referred for the further consideration of the court, not even the question of costs.

The printed papers contain that which is therein stated to be a "case with exceptions for the purpose of an appeal and a review of the evidence appearing on the trial, made by and on behalf of the defendants, the Farmers' Loan and Trust Company." Such "case" contains the evidence given and proceedings had on the trial of the action, the decision of the court, in the form of a judgment or order, which judgment or order, of itself, covers seventeen printed pages. That is followed by exceptions taken by the Farmers' Loan and Trust Company to decisions of the court. The exceptions are eigh-

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teen in number, and cover five printed pages, and relate to the merits.

The appellants insist that the appeal is taken under § 349 of the Code: that it is regular, and they have a right to be heard upon it. The respondents insist that none of the questions decided on the trial, or in the decision of the action, and embodied in the order appealed from, can be reversed except on an appeal from the judgment, and that such an appeal cannot be taken until the accounting has been had, and all questions that may arise upon it, have been disposed of at special term.

A. G. MORRIS, *for plaintiffs.*

C. O'CONOR, *for defendants and appellants.*

By the court—BOSWORTH, Justice. Section 268 of the Code provides a mode of reviewing, upon the evidence appearing on the trial, either the questions of law or fact which arise upon the trial, and declares that such questions, whether of law or fact, when arising on the trial, “can *only* be reviewed in the *manner* prescribed by this section.”

The questions of fact can only be reviewed upon an appeal to the general term of the same court, under § 348. The questions of law may be reviewed on that appeal, and subsequently on an appeal from a judgment of the general term, to the court of appeals.

In order to have that review, a case may be made within ten days after notice of the *judgment*, and within the same time, either party may except “to a decision on a matter of law arising on the trial,” and embraced in the final decision of the court at special term.

The preparation of a case, therefore, containing exceptions, need not be made until after judgment in the action.

And no review of any such decision whether of fact or law, can be had except on an appeal from such judgment.

If any question of law, included among the “conclusions of law,” required by section 268, to be stated by the court, may be reviewed upon an appeal under section 349, it is diffi-

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cult to find anything in the Code which would not permit the review of all of them upon such an appeal.

We think such a practice is clearly prohibited by the Code, and that it was not the intention of the legislature to allow more than one appeal to the general term, to review any decisions made *during the progress of the trial*, from its commencement *to the close of the proceedings therein*, ending in a final determination between the parties of all questions involved in the issues.

The "judgment" from which an appeal may be taken to the general term, means the same thing as a judgment from which an appeal may be taken to the court of appeals.

From such a judgment or order as is now entered, no appeal to the court of appeals would lie, until the account had been taken, and it appeared that the proceedings for that purpose had raised no questions, or if they had, that all such questions had been disposed of by the special term, or that by reason of an omission to appeal from the special to the general term, within the time allowed by law for that purpose, both parties, as to such questions, were concluded. (2 *Coms.* 571; 4 *Coms.* 416; 2 *Seld.* 465.)

There are many cases, and this seems to us to be one, in which it might save expense and promote justice, if a review could be had at the general term, in its present stage. But we are of the opinion that such a practice is prohibited by the Code, and this court, at the last June term, in *Dey agt. Morgan*, so decided. That case we are unable to discriminate from the one before us. That was moved before all the judges, and they all concurred in the conclusion stated.

The "order" from which an appeal is allowed by section 349; when "it involves the merits of the action, or some part thereof, or affects a substantial right," must be something different from a decision during the actual progress of the trial, disposing of some claim made by either party affecting the relief to be granted, and something other than a conclusion of law included in the decision on which the judgment, in whole or in part, is to be entered.

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The directions in the judgment or order appealed from, whether declaring that an account shall be taken, or what matters it shall include, or what items shall be subjects of credit, or what items subject of debt to either party, relate as strictly and absolutely to the merits as developed on and determined by the trial of the action, as the decision that the plaintiffs are entitled to redeem.

By the definition of an order, as given by the legislature and written in the Code, (§ 400,) no direction of a court or judge, made and entered in writing, and included in a judgment, is an order.

The decisions which the appellants seek to review are included in the judgment in this action. Although the order or judgment appealed from in the present condition of the action does not fully meet, in all particulars, the meaning of the word *judgment*, as defined by the Code, (§ 245,) yet when the account shall have been taken, and all questions relating to the account itself shall have been disposed of, the order appealed from, *as it now reads*, (with the result of the accounting shown by the record,) will become a judgment, as defined by the Code, according to the views expressed in *Swarthout agt. Curtis*, (4 Com. 415,) and will be the judgment, in this action.

BRONSON, Ch. J., in that case said: "There is undoubtedly a want of strict accuracy in calling the same decree final at one time, and not so at another; but the construction we have given to the statute is the only one which will secure the right of review, and at the same time give effect to the manifest intention of the legislature to abolish the former practice, which allowed several appeals in different stages of the same cause, and restrict the parties to one appeal to be brought after final judgment."

It is true that was said of an appeal taken to the court of appeals; but the decree appealed from in that case, was conceded to be *final*, within the meaning of that term under the former practice. Nothing remained to be done except to compute the amount due on a bond and mortgage, and no questions were reserved to be thereafter adjudicated by the court,

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But it was held not to be final, for the purpose of an appeal under the Code, until after the account had been taken and the questions arising upon it determined.

An appeal to review the questions named in § 268, as subjects of review, can only be taken from a judgment, as defined by the Code. For the purpose of an appeal to review such questions, it is as necessary that the judgment should be final, in the meaning given to that word by the Code, as to authorize an appeal from it to the court of appeals.

From every actual determination made at a general term, by the court, in a judgment in an action commenced therein, an appeal may be taken to the court of appeals. The word judgment, as used in §§ 11, 245, 268 and 348, means precisely the same thing.

When, at the close of a trial before the court, every question affecting the merits, including the costs of the action, is unconditionally determined, and no questions are reserved to be thereafter decided by the court, except that a reference is ordered, to ascertain some amount, which, according to the final decision made, one party or the other is to pay, and the final decision determines how that is to be ascertained, but directs a referee to ascertain it, the only matter which can possibly be reviewed upon an appeal from this final decision, taken before it becomes a judgment, is the competency of the court to direct a reference for such a purpose. If the court was competent to direct a reference for such a purpose, it is at least questionable, whether the order, in that respect, could be reviewed, for the reason that it would be discretionary with the court to grant it, or to ascertain the result without the aid of a referee.

We do not understand the competency of the court to order such a reference as was directed in this case to be questioned; we think it entirely clear that the court at special term could order such an account to be taken before a referee, and that with such an exercise of its discretion, the court, on appeal, would not interfere.

The appeal must be dismissed.

The People ex rel. The New-York Central Railroad Co. agt. Ross and others.

SUPREME COURT.

THE PEOPLE *ex rel.* THE NEW-YORK CENTRAL RAILROAD
COMPANY agt. JAMES P. ROSS and others, Assessors of the
Town of Ogden.

The classified list of real estate of railroad corporations, specifying various particulars, required by statute to be delivered to town assessors of the towns in which the real estate lies, on or before the first day of May in each year, must be regarded by the assessors as *prima facie* evidence of value, if delivered to them any time after the first day of May, before the completion of their roll according to law, in like manner as if it had been delivered before the first day of May.

If not delivered until after the completion of the roll according to law, the assessors are not bound to allow it any effect.

The roll is complete when the assessors are prepared to make a fair copy for public inspection, and give notice of their meeting for a review of their assessments.

Monroe Special Term, September, 1857.

MOTION upon an order to show cause for a writ of mandamus.

J. L. BAGG, *for relators.*

J. FULLER, *for defendant.*

T. R. STRONG, Justice. It is made the duty of every railroad corporation, by § 24 of title 4, chapter 13 of part 1 of the Revised Statutes, as said title is amended by chapter 536 of the laws of 1857, to deliver, on or before the first day of May in each year, to the assessors of each town or ward into which any part of their road shall run, or in which they own, or are in possession of real estate, a classified list of all real estate owned or in possession of said company, in said town or ward, specifying various particulars, and among others, the value of the property; and by § 25, in fixing the valuation of the property of the corporation, the assessors are required,

The People ex rel. The New-York Central Railroad Co. agt. Ross and others.

when such list shall be reviewed, to regard it as *prima facie* evidence of such value; but they may avail themselves of other additional evidence under oath in reference to the valuation. By § 26, a penalty is imposed upon any company omitting to furnish the list within thirty days after the first day of May; and I think it a fair implication from this provision, that if the list be delivered within the thirty days, the assessors in fixing the valuation of the property, must be controlled by it, in like manner as if it had been delivered by the first day of May. And probably, if the list be not delivered until a later period, the like effect must be given to it, provided the assessment be not then completed as provided by § 17 of title 2 of chapter 13 aforesaid, as amended by chapter 536 of laws of 1857. That section as amended, provides that the assessors shall complete the assessment rolls, on or before the first day of August, in every year, and shall make out a fair copy thereof, to be left with one of their number; and provision is thereby made for giving notices; which notices by the next succeeding section, as amended by § 4, chapter 176, laws of 1851, are to set forth that the assessors have completed the roll, and that a copy thereof is left with one of their number, at a place to be specified therein, where the same may be seen and examined until the third Tuesday of August, and that on that day the assessors will meet, at a time and place to be specified, to review their assessments. The object of the law in requiring the list of railroad corporations is to enable the assessors thus to complete the rolls, and if received before they are thus completed, I think it should be regarded as *prima facie* evidence of value. But if it is not delivered until after the completion of the roll according to the 17th section, I think the assessors are under no obligation to allow it any effect. The roll is then complete, and subject only to be changed upon a review thereof in pursuance of and in accordance with § 18 aforesaid, and § 6 of chapter 176 of the laws of 1851, as amended by the aforesaid chapter 536 of the laws of '1857. Those sections do not impose any duty upon the assessors to give to the list on the review any effect whatever.

Terry agt. Roberts.

It appears by the affidavits of the assessors in this case, that the list required to be furnished by the relators was not served upon any of the assessors until the 25th day of July last, and that prior to that day they had inserted in the assessment roll, their valuation of the property of the relators in that town, and had completed their roll. Assuming such to be the fact, if my views of the law, as above stated, are correct, the assessors were under no legal duty to regard the list, and the relators are not entitled to the writ of mandamus as asked for.

The assessors clearly could not receive an affidavit sworn to before a justice of the peace, as evidence on the subject of the value of the property to overcome the *prima facie* evidence afforded by the list, if it had been delivered in time.

That they assumed to give effect to the list when they were not bound to do so, does not strengthen the claim of the relators to the writ for error in allowing such an affidavit to overthrow the list.

Motion denied.

SUPREME COURT.

TERRY agt. ROBERTS.

Where a party is substituted as plaintiff in an action, without notice to the opposite party, the party so substituted stands in the shoes of his assignee, and is subject in equity, at least, to the same set-off as the original party would have been. (*This is in accordance with Howard & Brown agt. Taylor*, 11 How. 380. See also *Chappell agt. Potter*, id. 365.)

New-York Special Term, October, 1857.

MOTION for a stay of proceedings on giving adequate security.

Roberts commenced an action against Carter. Five days thereafter Carter commenced an action against Roberts. Both

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causes referred to Isaac Dayton, Esq., as sole referee, and by agreement the report in each case was to be simultaneously.

The referee reported due Roberts from Carter, \$800. Due Carter from Roberts, \$149.

The same day that the reports were given, Carter assigned the report in his favor to Terry, and Terry was *ex parte* substituted as plaintiff upon the record.

Judgment was perfected in each case. Carter appealed to the general term and gave security. Terry issued an execution upon the judgment perfected in his name.

JOHN FITCH, *for motion.*

EDMUND TERRY, *in person, opposed.*

ROOSEVELT, Justice. The plaintiff Terry stands in the shoes of his assignee, and was subject in equity, at least, to the same set-off by Roberts. Although an actual set-off is not allowable of one judgment against another when the first is appealed from, yet the only effect of the appeal (unless ultimately successful) is to suspend and not to extinguish the set-off.

The proper remedy, therefore, is a stay of proceedings, until the issue of the appeal can be known, on giving the proper security.

NOTE.—Affirmed on appeal at general term, November, 1857. MITCHELL, CLERKE and PRABODY, Justices.

Mott and others agt. Davis.

SUPREME COURT.

JOHN MOTT and others agt. DAVID G. DAVIS.

The defendant *confessed judgment* to the plaintiffs, upon a statement, which was in substance as follows: That he was indebted to the plaintiffs in the sum of \$3,300, and authorized judgment to be entered against him for that amount.

That the indebtedness arose on a balance of an account for merchandise purchased by the defendant of the plaintiffs, on various bills, commencing February 27, 1855, the last bill being dated November 28, 1856, amounting, in the total, to \$8,360.56; which total sum had been reduced by payments made by the defendant, commencing June 12, 1855; the last payment being December 16, 1856, the sum total of which payments amount to \$5,015.28, leaving a balance, without making any calculation of interest on the items of account purchased on time of six and eight months, of \$3,345.28; that there was at least due to the plaintiffs and to become due when the time should have expired on the last purchases, the sum of \$3,300.

Held, that this statement was sufficient to answer the requirements of the statute. (*The decisions in Gandal agt. Finn*, 13 How. 418; and *Stebbins agt. The East Society of the M. E. Church, Rochester*, 12 Id. 410; reviewed, and their strict views on this question disapproved.)

Albany Special Term, June, 1857.

MOTION to set aside judgment by confession. On the 5th day of March, 1857, the defendant executed and verified a statement, in which he confessed that he was indebted to the plaintiffs in the sum of \$3,300 dollars, and authorizing judgment to be entered against him for that amount.

It was further stated that the indebtedness arose on a balance of an account for merchandise purchased by the defendant of the plaintiffs, on various bills, commencing February 27, 1855, the last bill being dated November 28, 1856, amounting, in the total, to \$8,360.56; which total sum had been reduced by payments made by the defendant, commencing June 12, 1855, the last payment being December 16, 1856, the sum total of which payments amount to \$5,015.28; leaving a balance, without making any calculation of interest on the items of amount purchased on time of six and eight

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months, of \$3,345.28; that there was, at least, due to the plaintiffs, and to become due when the time should have expired on the last purchases, the sum of \$3,300; and that a copy of the total amount of each of said several bills, and also the amount of the several payments made by the defendant thereon, was thereto annexed, with the dates of such bills and payments.

The schedule annexed contained the dates and aggregate amounts of *fifteen* different purchases and fourteen different payments, the total amounts of which correspond with the sums mentioned in the statement. Upon this confession judgment was entered on the day of its date, for \$3,300, together with \$6.81 for costs.

On the 3d day of June, 1857, William N. Strong and others recovered against the defendant a judgment in the supreme court for \$1,806.85, which judgment was docketed in the county of Schenectady, where the defendant resides, and on the same day an execution was issued to the sheriff of that county. The plaintiffs in the latter judgment moved to set aside the judgment by confession.

S. O. SHEPARD, *for motion.*

PLATT POTTER, *opposed.*

HARRIS, Justice. I think the statement upon which the judgment in question was entered contains enough to answer the requirements of the statute. The origin of the indebtedness, or, in the language of the Code, the facts out of which it arose, are stated to be the purchase of various bills of merchandise by the defendant of the plaintiffs. The aggregate amount of these purchases is given. The dates of the several purchases are not specified, but two periods are mentioned, within which all the purchases were made; so, in respect to the payments, the aggregate amount is stated, and the dates within which all the payments were made are specified. It is then stated that the balance due and to become due to the plaintiffs, when the credit upon which the last purchases were

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made should expire, was at least \$3,300. Such a statement of facts is, I think, a substantial compliance with the provision of the Code, which requires that the statement shall show the facts out of which the indebtedness arose, and that the sum confessed is justly due or to become due. But if this were left doubtful by the statement itself, the schedule annexed to the statement, and which constitutes a part of it, makes it entirely clear. From that we learn not only the aggregate amount of purchases and payments, but the several dates of all the purchases and all the payments, and several amounts of such purchases and payments. It cannot be necessary, in any case, to go further, and state in detail the articles or kinds of merchandise embraced in the bills of purchase. (See *Delaware agt. Ensign*, 21 Barb. 85; *Schoolcraft agt. Thompson*, 9 How. 61; *Purdy agt. Upton*, 10 Id. 494; *Hoppock agt. Donaldson*, 12 Id. 141; *Post agt. Coleman*, 9 Id. 64.)

There are two or three reported cases which seem to favor the objections taken to the sufficiency of this statement. Of these, the case most relied upon by counsel is *Gandal agt. Finn*, (18 How. 418.) In that case, it appeared from the statement upon which one of the judgments was entered, that the indebtedness arose on account, for goods, wares and merchandise, sold and delivered by the plaintiff to the defendant since the first day of January, 1855. I should have been inclined to regard this statement as a sufficient compliance with the requirements of the statute. It was shown how the indebtedness arose. It was upon the purchase of goods, wares and merchandise by the defendant of the plaintiffs. It also appeared that such purchases were made between the date mentioned and the time the judgment was confessed. I should have held such a statement to be sufficient. But the learned judge who decided that case thought otherwise. He was of opinion that when the consideration of the indebtedness is property sold, "the nature of the property should be set forth with other particulars of distinction than the general statement that it was real or personal property, and the time of the

transaction should be specifically stated." It is evident that the principle of this decision would be fatal to the judgment in question. According to the view here taken, it is not enough to state that the indebtedness arose upon the purchase of personal property, or even merchandise, by the defendant, but the kind of merchandise, as dry goods, or perhaps more particularly still, broad cloths, linen goods or silks, or hardware, or groceries, should distinctly appear. Such a construction, it seems to me, is not demanded, either by the language or the policy of the statute in question. All that is required is, that by some concise and general mode of expression, those who may have occasion to inquire may be able to know what was the origin of the indebtedness for which the judgment is confessed.

In *Stebbins* agt. *The East Society of the Methodist Episcopal Church, Rochester*, (12 How. 410), an interpretation similar to that which prevailed in *Gandal* agt. *Finn*, was adopted. I have already had occasion to notice this case, and to express my dissent from the conclusions which governed in its decision. (See *Bank of Kinderhook* agt. *Jenison*, *Ante*, 41.) If the statute authorizing the entry of a judgment by consent, and without action, is to receive an interpretation so strict and exacting as that adopted by the learned judges who decided these cases, it is easy to see that, instead of being a convenient and reliable mode of obtaining a judgment where there is no controversy, it would be the most uncertain and dangerous remedy to which the creditor could resort. He would be left, in every case, to depend upon the peculiar views which the judge who might be called upon to decide as to the sufficiency of the statement, might entertain in respect to the degree of particularity requisite in stating the origin of the indebtedness upon which the judgment was founded. In the case before me, I think the statement shows, with reasonable certainty, that the defendant, at the time the judgment was confessed, was indebted to the plaintiffs to the full amount stated, and how that indebtedness arose. This is all that the statute requires. The motion must, therefore, be denied, with costs.

Dale agt. Radcliff and Cutter.

SUPREME COURT.

DALE agt. RADCLIFF and CUTTER.

The Code (§ 204) provides that a defendant may apply on motion to vacate an order of arrest, at any time "before the justification of bail." The question is, does this provision include a case of this kind :

The defendants' attorney, on the day of the arrest of the defendants, proposed to the plaintiff's attorneys, that they should then accept bail, to which the latter consented, on condition that the bail should be forthwith examined by them. The bail were accordingly examined as to their qualifications; their depositions were written down and signed, and then delivered to the defendants' attorney, to be attested in the usual manner before a commissioner. After the examination, the plaintiff's attorneys indorsed upon an undertaking which was produced by defendants' attorney, a consent that the sheriff should accept this bail. The consent being presented to the sheriff, he discharged the defendants from custody.

Held, on motion afterwards made to discharge or vacate the order of arrest, that the defendants had voluntarily and deliberately took a step fully equivalent to the affirmative act of a technical justification, and had thereby waived any objection to having been held to bail. Motion denied.

New-York General Term, September, 1857.

APPEAL from an order denying motion to discharge from arrest.

_____, *for plaintiff.*

_____, *for defendants.*

By the court—CLERKE, Justice. The defendants were arrested on Saturday the 14th June, 1856, under a judge's order, and at 10 o'clock in the evening of that day, their attorney called on the attorneys of the plaintiff, and proposed that they should then accept bail. After considerable hesitation, they consented to this proposal, on the condition that the proposed bail should be forthwith examined by them. The bail were accordingly examined as to their qualifications; their depositions were written down and signed, and then delivered to the defendants' attorney, to be attested in the usual manner,

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before a commissioner. After the examination, the plaintiff's attorneys indorsed upon an undertaking, which was produced by defendants' attorney, a consent that the sheriff should accept this bail. The consent being presented to the sheriff, he discharged the defendants from custody that night, or on the following day.

The indorsement on the undertaking was in the following words:

"We approve of the within undertaking, and are satisfied with the sureties, June 14th, 1856." After the lapse of several months (on the 26th February last), a motion was made on behalf of the defendants, to discharge or vacate the order of arrest before Judge PEABODY, who denied it, on the ground that the defendants had waived their right to move to vacate the order by proposing bail to the plaintiff's attorneys, as above stated, by inducing them to examine and accept the bail, and by said acceptance procuring their discharge from custody. By the consent, and by indorsing their satisfaction on the undertaking, the plaintiff's attorneys relinquished their right to except, so that no objection to the bail could be afterwards made, and no further examination of them be demanded.

It is insisted by the defendants' counsel, that as the Code (§ 204) provides, that a defendant may apply on motion to vacate the order of arrest at any time "before the justification of bail," and as the defendants did not, literally, justify in this case, after exception regularly taken in the ordinary way, that they are not precluded by the arrangement above referred to, from moving to set aside the order of arrest. Undoubtedly, the court in this district, at general term, decided in *Barber agt. Hubbard* (3 *Code Rep.* 171), that a motion of this description may be made at any time before justification, even after the expiration of the time for the party to except, and where, consequently, there could be no justification, the bail having been forfeited by the mere lapse of time. This is contrary to some decisions in other districts, and in other courts, where it has been held, that the time for excepting having elapsed, and the bail having, consequently, become

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perfect, in analogy to the provision of the Code (§ 204), the defendant waived his objection to having been arrested or held to bail. Judge MITCHELL placed the decision of this court on the ground that mere inactivity in allowing the time to expire for the opposite party to except to bail, without the defendant's moving in the meantime, did not amount to a waiver; and in this respect the court in this district differed, and still differs from the decisions to which I have alluded. It does not, however, by any means contend, that in order to debar a defendant from making this motion, there must be a literal or actual justification; but to debar him, he must take some step in the cause, which, from its nature, assumes that it was proper to require bail. He must do something *affirmatively*; and then, in analogy to § 204, it may be reasonably supposed that he has waived any objection to having been held to bail. It is then too late for him to ask to have the order of the arrest vacated.

This section declares in effect, that if he justifies, he waives the right; it is a fair indication that he has not the inclination or ability to disturb the order; but merely refraining from doing this, is no evidence of any such acquiescence. Where personal liberty is concerned, it is not expedient to infer intention from negative conduct, from mere omission. In the case before us, the defendants voluntarily and deliberately took a step fully equivalent to the affirmative act of a technical justification. They offered bail to the plaintiff's attorneys. They induced them to examine the bail, and after the same kind of examination that takes place on justification, the attorneys, at the solicitation of the defendant's attorney, wrote their approval on the undertaking, precisely equivalent to the allowance of bail by a judge, and producing the same effect; the discharge of the defendants from custody. In the language of Judge MITCHELL in *Barber agt. Hubbard*, "this was an act, which from its nature, assumes that it was proper to require bail," and may be considered very justly, a waiver of any objection to having been held to bail.

The order appealed from, should be affirmed, with costs.

Huber agt. Lockwood, Sheriff.

SUPREME COURT.

VICTOR HUBER *art.* ORRIN LOCKWOOD, Sheriff of Erie County.

Where the plaintiff's complaint was dismissed by default, at the circuit, prior to the 17th April, 1857, when the amendments of the Code in relation to costs were passed, and the plaintiff procured a stay of proceedings, and on the 6th of May following moved to open the default, which was denied, with costs; *Held*, that the clerk should have adjusted the defendant's costs under the Code, previous to the amendment of the 17th April. The cause had been disposed of prior to that time.

Erie Special Term, July 1857.

MOTION for re-adjustment of costs.

G. PARSONS, *for plaintiff.*E. STEARNS, *for defendant.*

MARVIN, Justice. At the April Erie circuit the complaint was dismissed, the plaintiff failing to move the trial of the issues joined. The plaintiff obtained an order staying proceedings, and on the 6th May made a motion to be relieved from the default taken at the circuit. The motion was denied with costs. May 11, the costs were adjusted by the clerk upon proper notice, and the items of costs were allowed according to the act of April 17, 1857, amending certain sections of the Code relating to costs.

I think the clerk erred. The action had been disposed of prior to the taking effect of the act of April 17, 1857; that act did not go into effect until the 17th April. The right to costs and the amount of the costs were regulated by the provisions of the Code, as they were prior to the 17th April, when the law amending the Code became operative. I have examined the cases cited by the defendant's counsel. (3 *Den.* 173; 4 *Wend.* 210; 1 *Duer*, 617.) They are not applicable to the question as here raised. The clerk will re-adjust the costs.

SUPREME COURT.

CORNELIUS L. ANDROVETTE agt. OBADIAH BOWNE and
others.

Orders to show cause, are not granted as a matter of course, and when the application is presented in the objectionable form of an intermediate *restraining clause*, without security, it should be well considered before allowed.

The Code, as a general rule, requires that a motion shall not be made without a notice of eight days. The court or a judge have the power to prescribe a shorter time, or even dispense with notice altogether; but this power is confined to exceptional cases, and should not be exercised indiscriminately on all occasions, many of them not of urgency, but only of urgent parties.

An unguarded and too free use of the *injunction* power must inevitably lead to its entire suppression.

At Chambers, May, 1857.

APPLICATION for an order to show cause why a temporary injunction should not issue.

ROOSEVELT, Justice. The plaintiff, who is the owner of the premises adjoining the Wolfe farm on Staten Island, asks for an *ex parte* injunction to restrain the quarantine commissioners from erecting any hospital buildings or docks on the farm lately purchased by them, and from designating for the anchorage of fever vessels a certain part of the bay, situated about a mile and half distant, and which has been selected for that purpose. Without going into the merits of the plaintiff's application, it is sufficient to say that no case of an immediately pressing character is made—none, at all events, so urgent as to render it proper to dispense with the usual preliminary notice to the adverse party.

Nor are orders to show cause, matters of course. They imply, when granted, at least a partial expression of opinion, which should always be avoided if practicable. They are the more objectionable, too, when accompanied, as is sought in this case, by an intermediate restraining clause, and that with-

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out security for any damage which may result from the stoppage, should the complaint afterwards, on a hearing of both sides, turn out to be unfounded.

The Code, as a general rule, requires that motions shall not be made without a notice of eight days; and although the court or judge may prescribe a shorter time, or even dispense with notice altogether, the power, it is obvious, was intended to be confined to exceptional cases, and not to be exercised indiscriminately on all occasions, many of them not of urgency, but only of urgent parties.

The writ or order of injunction is a valuable remedial process. It has been in use for centuries, and in the present state of society its occasional application is as indispensable to the body politic, as certain medical and surgical operations are to the body natural. Like them, however, it requires great caution. An unguarded and too free use of the injunction power must inevitably lead to its entire suppression, a result which, in the course of time, none would deplore more than those who are now so clamorous to bring it about.

Motion denied, with leave to renew it on the regular eight day notice.

SUPREME COURT.

**The People *ex rel.* THE GENESEO, MOUNT MORRIS AND YORK
PLANK ROAD COMPANY, agt. JAMES T. HALL and others,
Commissioners of Highways of the Town of Geneseo.**

The statute providing for the application of highway labor in certain cases on plank roads, has no application to assessments in respect to persons, or in respect to any property not in the road itself, or in or attached to land immediately adjoining.

It does not embrace assessments for the personal property generally of the owner of land upon the line of the road, or for the capital of a banking corporation, or personal property held in trust.

The People ex rel. The G. & M. M. & Y. P. R. Co. agt. Hall and others.

A tenant or occupant of land on the line of a plank road liable to be assessed for highway labor in regard to the land, is authorized by the statute to apply to the commissioners to be assessed on the plank road.

Ontario Special Term, August, 1857.

DEMURRER to a return to an alternative mandamus.

HASTINGS & BINGHAM, *for relators.*

A. A. HENDEE, *for defendants.*

T. R. STRONG, Justice. This case calls for a construction of the statute providing for the application of highway labor in certain cases, upon plank roads, in regard to the labor which may be applied for the benefit of such roads.

The statute is in these words: "Every person liable to do highway labor, living or owning property on the line of any plank road of this state, may, on making application in writing to the commissioner or commissioners of their respective towns, on any day previous to the time of making the highway warrants by such commissioners, be assessed the apportionment of highway labor for such property upon such plank road, and the commissioner or commissioners shall assess such person for the land or property owned by him in or upon the line of said plank road as a separate road district." (*Laws of 1855, 905.*)

It will be noticed, that the statute is in terms limited to assessments in respect to property; hence assessments upon the person, irrespective of property, are unaffected by it, and are left to be governed by other provisions of the statute relating to the performance of labor on the highways.

It will be further observed, that the statute under consideration is by its terms applicable only to assessments for particular property, that is "land or property, &c., in or upon the line of a plank road." This language excludes all property not in the road itself, or in or attached to the land immediately adjoining. Personal property, generally of the owner of the land, cannot with any propriety, in the ordinary legal view of

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such property, be said to be in or upon the line of the road. It has no locality and follows the person of the owner.

The capital of a banking corporation, and personal property held in trust, occupy the same footing as other mere personal movable property in respect to the statute in question.

The persons authorized by the statute to make application to the commissioners to be assessed upon the plank road, are persons liable to do highway labor living or owning property on the line of a plank road, and the assessment is to be for land or property owned by them. A tenant or occupant of land liable to be assessed for highway labor in respect to it, I think comes within this provision, and is, for the purpose of it, an owner of the property. It could not have been contemplated by the legislature that only persons having title in fee should have a right to apply to be assessed on the plank road, but it must have been intended that any person should possess the right who so occupied as to be liable to be assessed for the land. If this be not so, in all cases of land assessed to mere tenants and occupants under others, no person could compel an assessment of the highway labor in respect to the land upon a plank road.

The policy of the statute was to give to the person liable to assessment for the land, the right conferred by the statute.

No executory contract was created between the supervisor and commissioner of highways of Genesee, and the plank road company, by the consent of the former to the taking and use of the highway by the company. It was a mere grant of a right. The statute in question does not violate any of the provisions of the instrument. (*Pulmer agt. Fort Plain and Cooperstown Plank Road Company*, 1 Kernan, 376.)

It follows that there must be judgment for the relators as to assessments of tenants or occupants for lands on the line of the plank road, the return in respect to those assessments being insufficient.

SUPREME COURT.

HENRY MCCANN agt. PATRICK BRADLEY and WILLIAM
BRADLEY, administrators, &c.

Where an action is commenced against a defendant, and *pendente lite*, he dies, and his administrators are substituted defendants, and the action is continued under the Code, without any presentment of the claim to the defendants, or offer to refer under the Revised Statutes, the plaintiff cannot recover *costs*, if he succeeds in the action.

New-York General Term, November, 1855.

Present, MITCHELL, CLERKE and COWLES, Justices.

THIS action was originally commenced in November, 1853, against James Diamond and John Haggerty, as partners, to recover for work and labor. After the service of the summons and complaint on Haggerty, and before the same was served upon Diamond, Diamond died. Haggerty put in an answer making an issue. An order was subsequently entered continuing the action against Haggerty as surviving partner of Diamond, deceased, and the cause in this situation was referred to Wm. H. Elting, referee, to hear and determine.

During the trial before the referee, Haggerty died, and the defendants, his administrators, were subsequently substituted by an order of the court, in his place.

The trial, after their substitution, was continued and concluded before the same referee, who reported \$284.27, in favor of the plaintiff.

The plaintiff then moved to be allowed the costs of the action to be taxed, and an extra allowance.

This motion was denied at special term in May, 1855, and the following opinion given :

ROOSEVELT, Justice. The plaintiff claimed nearly twice as much as he was entitled to. The defendants, therefore, properly resisted his demand, and I may assume that the expense

of the referee was principally attributable to plaintiff. There should, therefore, be no allowance.

But the statute goes further, and declares that no costs shall be recovered "in any suit at law against any executors or administrators," unless it appear that the demand was first presented to them, or unreasonably resisted, or neglected, or refused to be referred; and it must not only have been presented before suit, but (if advertised for) before the expiration of the time limited in the notice; and accompanied too, if required, by vouchers and affidavits; and it is reasonable that it should be so, when claims are made upon representatives of dead persons.

The act is remedial and to be therefore liberally construed.

Motion for costs and extra allowance denied.

The plaintiff thereupon appealed from the decision at special term to the general term.

NELSON SMITH, *for plaintiff.*

S. M. & D. E. MEEKER and JESSE C. SMITH, *for defendants.*

By the court—COWLES, Justice. What costs a party is entitled to, depends upon the state of facts and the law, as they exist at the date of the judgment. They do not vest from time to time as the suit proceeds.

Therefore if the law *pendente lite*, alters or amends the law as to costs, the state of the case at the date of the judgment controls

Here the suit abated unless it was revived, and without asking the administrators here to refer, the plaintiff revived the suit and went on. Besides, he claimed more than he was entitled to, so plaintiff cannot recover his costs.

SUPREME COURT.

SHADRACH NEALE agt. NEHEMIAH OSBORNE.

A party restrained by injunction from doing a particular act, cannot stand by and see the injunction violated by a partner at their common expense, or for their common benefit.

To stand by, aid and abet, or countenance and connive at a violation of an injunction by a partner, under such circumstances, will be held a disobedience of the injunction by the party restrained, and will be punished as such.

All persons duly served with an injunction are bound to obey the same in its letter and spirit while it remains in force, and every evasion of it, or contrivance to frustrate it, will be treated as a contempt and punished as such.

Monroe Special Term, May, 1857.

ATTACHMENT for disobedience of an injunction.

The defendant and one Josiah W. Bissell had purchased a certain building in Rochester, the basement of which was used and occupied for stores, and the upper part for a church. The building was sold to be removed from the ground for the purpose of replacing it with new buildings. The relator had a lease of one of the stores in the building, which was unexpired, and commenced a suit and obtained an injunction restraining the defendant Osborne from tearing down the building, and not making Bissell a party to the suit. The injunction being violated, as the relator claimed, he obtained an attachment against Osborne. On the return of the attachment, interrogatories were duly filed and answered, and it was referred to a referee to take proof in respect to the matters thereof. On the coming in of the referee's report, the matter was brought on for argument. The facts will more particularly appear in the opinion.

E. A. HOPKINS, *for plaintiff.*

W. F. COGSWELL, *for defendant.*

E. DARWIN SMITH, Justice. It is quite apparent that the injunction in this action has proved entirely abortive. Whether

its complete evasion has been accomplished without involving any responsibility on the part of the defendant, is practically the only real question presented upon the papers before the court. The plaintiff being in possession of a store in the basement of the Methodist Church building, upon a complaint, with an affidavit annexed, showing that the defendant threatened to tear down such building, and had actually commenced such work of demolition, obtained an injunction from Judge HUMPHREY, late county judge, forbidding the tearing down of such building or in any way interfering with the use and enjoyment of the plaintiff thereof.

This injunction the defendant immediately applied to Judge STRONG, to dissolve or modify, stating in his affidavit that he purchased said building at auction sale, and was the owner of one-half thereof, and that the effect of the injunction was to prevent the owner of said property from beneficially enjoying the same and building thereon, and that to enable the said parties to perform their agreements, (that is, to build thereon in six months,) it will be necessary that defendant should remove the said buildings at as early a date as possible, and that if the injunction is retained, it will prevent such parties from using the same, &c. And further, "that the damage he will sustain by reason of the delay resulting from being prevented from tearing down and removing said building, will be at least \$300, in addition to the value of the materials." And further, that "the sum of \$400 will be entirely inadequate to compensate defendant for the damage he will sustain if said injunction is retained unmodified." And further, that he is advised that it is doubtful in case he should not remove said buildings by the 8th of June, whether defendant would not be liable for damages, &c.; and also admitted that he told the plaintiff, on or about the first of May, that "he was going to commence taking down the church, the next week, &c." Upon this affidavit and others, showing that the residue of the building, except the portion occupied by plaintiff, could be taken down without injury to the plaintiff or interfering with his use and enjoyment of the store occupied by him, Judge

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STRONG modified the injunction so as to restrain the defendant, his servants and agents, "from demolishing, destroying or interfering with that portion of the said building occupied by plaintiff, and from doing any act in relation to the said building, which should endanger the safety of the said plaintiff's store, or should prevent the full and free use of the same."

Immediately upon the granting of this order, the work of demolishing said building is recommenced, and the whole building, except the walls of plaintiff's store, are torn down; the roof over this store removed; his window broke in; a shed erected over his front window; his awning broke away, and his store rendered almost inaccessible from obstructions in the street, and entirely unsafe and uncomfortable, and the full and free use thereof entirely interrupted.

The injunction has thus been entirely frustrated. It has not sufficed to afford the slightest protection to the plaintiff. His property has been exposed to injury from the rains, and his occupation of the store rendered scarcely endurable.

The plaintiff had a lease of this store. He was entitled to occupy peaceably. The respondent had not the slightest right to interfere with his full and complete enjoyment of said store. The injunction was designed to protect this right, and prevent such interference, and while it remained in force should have been obeyed.

The defendant now says, in effect :—True, the rights of the plaintiff have been entirely disregarded, the object of the injunction entirely frustrated, but I am not to blame. My partner, Bissell, perpetrated the wrong. I was merely passive, while he disregarded the injunction. I looked on and saw him do it. I watched, superintended and inspected the work of demolition, but Bissell employed the hands; he, in fact, directed the work.

But this will not do. An injunction cannot be evaded in this way. The defendant applied for its modification, avowing the work to be his,—the injury to be his, in part at least. He declared to the plaintiff and others, that he intended to tear down the building before the work began. He was daily there

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directing about its demolition. He hired some of the hands and paid confessedly half of the expense. He had his teams there removing the materials, half of which belonged to him. It is the veriest of trifling to say, under these circumstances, that Bissell did the wrong, and the defendant is not responsible. He was present, aiding, abetting, advising, assisting and directing. The work was not done by Bissell, without his active concurrence and participation. It may be, if the defendant had been away, and was in no way privy to the work of tearing down the building, that he might not be responsible in this proceeding for the acts of Bissell. But to allow the defendant to escape responsibility in this case by throwing the blame upon Bissell, and making him the scapegrace for violating this injunction, would be to connive on the part of the court, at a most palpable disregard of its process, at the complete and perfect evasion of an injunction deliberately granted, in its modified form, by one of its judges. This will not do. All men must obey an injunction of this court, to them directed, upon due service thereof, and will not be allowed to shuffle it by, or evade it by any contrivance. It is essential to the public interest that this process of the court be implicitly obeyed in its spirit as well as in its letter; and this court would be wanting in its duty to the public if it winked at its violation in any particular. The integrity of this process, and the dignity of this court, and the proper administration of justice, must be vindicated by prompt and inflexible punishment in all cases where an injunction has been disregarded or disobeyed. This is clearly such a case, and it must be adjudged that the defendant is guilty of contempt of this court in tearing off the roof from the plaintiff's store in such a manner as to expose his property to injury from the rains, and himself and family to discomfort therefrom, and for breaking in his window, breaking down his awning, and obstructing the entrance to his store, and other interference with his free use and enjoyment thereof; and that such misconduct was calculated to, and actually did impair and prejudice the right and remedies of the plaintiff in this action. And it

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must be referred back to the said referee who took the proofs in this proceeding, or some other referee, to be designated by the court, if the parties do not agree upon one, to ascertain, determine and report to what extent, and in what amount, the plaintiff was actually injured by the misconduct in question, and what was the actual loss of the plaintiff therefor, and it is so ordered.

SUPREME COURT.

THE LEXINGTON AND BIG SANDY RAILROAD COMPANY agt.
HENRY H. GOODMAN and thirteen other defendants.

Several causes of action can properly be united in one complaint only where they *each* affect *all* the parties to the action. (*Code*, § 167.)

It is not sufficient that some of the defendants be affected by each or all of them. All the defendants must be affected by each of them to warrant the union of them in one suit.

Accordingly where B., as agent of A., and authorized to sell for him a lot of securities, sold separate parcels of them to different persons, under different contracts, in violation of the authority received from A., *held*, on demurrer, that in an equitable suit to compel the surrender of them, the causes of action against the various purchasers could not properly be united; one having no interest in the case of the other:

That each purchaser should be sued separately from the others:

But that the agent or trustee who made the transfer might be joined in the suit against each of the purchasers.

New-York Special Term, November, 1857.

THIS is a demurrer to a complaint. The plaintiffs in their complaint, state that some time prior to the commencement of this suit, they deposited with the defendants, Goodman, Bates and Whiton, composing the firm of H. H. Goodman & Co., in the city of New-York, securities, of several kinds, railroad bonds and others, to the amount of nearly a million of dollars, for sale for their (plaintiffs') account. The securities thus deposited are said to have been all of them for sale, and

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as to some of them, H. H. Goodman & Co. were also authorized to hypothecate them as collateral security for loans they might be able to procure for plaintiffs, and as to others they were only authorized to sell.

The authority given by plaintiffs to H. H. G. & Co., was in writing, and is set forth in the complaint.

The complaint then proceeds to state different transfers of said securities to ten separate defendants, and states the different contracts under which they were sold, pledged or otherwise conveyed to each of the ten parties defendant, stating the case of each of the defendants separately. As to each of them, it states a contract which would be void as against plaintiffs, and proceeds to pray for final relief against each defendant, that the securities held by him be surrendered, and then asks the temporary relief of an injunction restraining the disposal or transfer of them during the pendency of this suit.

THOS. NELSON *and* WM. TRACY, *for plaintiffs.*
E. MORE, *for defendant Ackerman.*

PEABODY, Justice. To this complaint, the defendant Ackerman demurs, substantially on the ground of a misjoinder of actions against the different defendants, urging that he should not be united with the other defendants in the suit, but should be sued alone, if at all, and the question presented by this demurrer I am to decide.

In the original transaction between plaintiffs and Goodman & Co., lying at the foundation of this matter, the defendants have interests somewhat in common; for on that contract depends the authority of the latter to dispose of the securities in question.

It may be said that even by that contract, the agents received different authority as to the different classes of securities, so that the holders of one class of them would not be interested in the part which relates to the others, and hence that the interest is not common to them even in this respect, although the

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authority as to all the securities was embraced in the one writing; and it would, no doubt, be true to a very considerable extent, upon the theory of the plaintiffs, which is, that by that paper, certain powers are conferred as to some classes of the securities, different from those given as to others.

But assuming that the defendants, all of them, deriving their title through this as a common source of authority to the agent, have a similar interest in it, is there such a community of interest in the defendants, that they are properly united in one suit? For unless there is some connection between the interests of defendants, so intimate that they may be said in some sense to be united, they are not properly joined. If all the defendants were united in interest as to each of the several causes of action, that would be a good reason for uniting them in one suit, but the union of interest must extend to all the defendants, and that interest of them all must extend to all the causes of action; for it is certain that in a suit against five defendants, it would not ordinarily be proper to state as one of the causes of action, a cause unconnected with the others against only three of them, even though other causes embraced in the same pleading, did relate to all the defendants. In other words, upon general principles of pleading, a person is not properly made defendant in a suit for a cause of action in which he has no interest, and as to which no relief is sought against him. Section 167 of the Code in the last clause of it, expressly requires that where several causes of action are united in one suit "they must affect all the parties to the action."

How is Ackerman, the demurrant, interested in the claim against Murray, for instance? The transactions of the several defendants with the agents of plaintiffs are separate and distinct. No two of the parties appear to have bought or contracted for or received the securities jointly (except, perhaps, in one or two instances, where the two composed a firm, and Ackerman's is not one of these cases.) The agents of plaintiffs had their securities for sale, and at different times sold or disposed of separate parcels of them to several purchasers. What

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interest has one of these purchasers in the transaction with another, or the judgment that shall be pronounced upholding or invalidating the claim of that other? It neither adds to nor diminishes his rights, nor affects them in any manner that I perceive.

If the defendants were holding by virtue of some common act—if their title were the same—if some one act or transaction were the foundation of the claim against them all, there would be more ground for saying that they had such a community of interest as to make one interested in the case of the other, though even in that case the necessity for the connection might not be very apparent. If, on the other hand, their claims conflicted, and all the parties had, or might from the statement of the case, have conflicting claims to the same securities, or each might have an interest in invalidating the securities held by the other, the necessity for joining them as defendants, would be quite apparent.

This was, to some extent, the case in the great New-Haven railroad suit—sometimes called the Omnibus suit. In that case, there was a limit by law to the amount of stock which the company could issue, and it was apparent that any claimant of stock might, in some aspect of the case, be interested in defeating or postponing the claim of another; so that by excluding that, he might, if he could, bring his own within the limit prescribed by the charter. There seemed to be a reason, and even a necessity, for uniting all as defendants there.

In this case there is no such excuse for uniting the actions against the different defendants, and the fact that they all received the securities from the same person, while the contracts under which they received them were distinct and independent, does not seem to me to afford any good reason for uniting them all in a suit against each to recover back the securities held by him. Here the agent borrowed money on one from A., who had notice that the agent had no authority to pledge it; he borrowed of B. on a pledge of it on a rate usurious, and which invalidates the contract; to C. he passed one as security for an antecedent debt of his own. Is there any good

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reason to justify a pleader in making C. a defendant jointly with A., in a suit respecting the security of A. alone? For, unless there is, in the case of each defendant, that which justifies the joining of the other defendants in the suit, if it related to the security of the one defendant alone, there is not sufficient cause for joining them as they are joined.

Now if this suit were brought to recover the securities from Mr. Murray alone, what necessity would there be for joining the other defendants in it? And so, if the suit were to recover from Mr. Ackerman alone what is claimed against him in this complaint, what propriety would there be in joining the other defendants? Have they any interest in Mr Ackerman's case? None whatever, that I can perceive. The causes of action are separate and distinct against each defendant. Neither has any legal interest in that against the other, and the causes of action, instead of affecting "all the parties to the action," each affects only the party who holds the security to which it relates.

The causes of action are stated separately in the complaint as they should be, and there is no joint liability of any one with the party demurring. He is not in any legal manner, according to the complaint, interested in that of any of the other defendants, nor is any one of the other defendants interested in the controversy between him and the plaintiffs.

Suppose that the several lots of securities were each of them a house illegally conveyed by the agents, and this suit was brought to rescind the conveyances and recover them back, and suppose that one of the houses was in Fourteenth street and one on Bowling Green, and the others were in as many different streets in this city; and suppose that the authority under which the agent sold all of them, was, as in this case, contained in one single instrument, and was the same as to all, would there be any doubt that the causes of action and the defendants were improperly united in one suit? The two cases seem to me entirely similar in principle. The foundation of the action as to each defendant, is the transaction by which he gets the particular securities he holds. The contract thus separately made with each, is the contract sought to be re-

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scinded as to him, and the rescission is sought in each case only as to and against the single defendant with whom it was made.

The particular matter in litigation, as to each, is peculiar to his own case, and no one subject or cause of action is common or of joint interest to them all. (*Brinkerhoff agt. Brown, 6 Johns. Ch. Rep. 156.*) And the numerous cases there cited seem to me conclusive of the principle of this case.

Judgment must go for defendant, with liberty to plaintiffs to amend, so as to separate him from all defendants except Goodman & Co., who, as trustees, may properly be united in a suit against each defendant by the *cestui que trust*, at the option of the plaintiff, (2 *Paige*, 278,) on the usual terms.

SUPREME COURT.

WILLIAM H. WILLSON agt. JOSEPH C. HENDERSON.

The court will never allow a party to be prejudiced by its own *delay*.

The delay of the court in announcing its decision on a motion, will not be allowed to operate to the prejudice of the party in whose favor the decision is made.

The court having determined the question, must give effect to the decision as of the time when the motion was made.

Where a motion to change the venue was made by the defendant, and during the time the question was held under advisement, the plaintiff took an inquest on a regular call of the calendar, there being no stay of proceedings; *held*, that the plaintiff was *irregular*. The plaintiff took the risk of having his proceedings set aside if the motion was decided against him.

Albany Special Term, March, 1857.

MOTION to set aside judgment for irregularity. The plaintiff resides in Canada; the defendant in the city of Albany. The suit was commenced in November, 1856, and the venue was laid in St. Lawrence. Before the time for answering ex-

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pired, the defendant demanded that the trial be had in the proper county. Subsequently, the defendant put in his answer, to which the plaintiff served a reply. The plaintiff then noticed the cause for trial at the St. Lawrence circuit, to be held on the 17th of February. The defendant served papers and gave notice of a motion to be made on the 29th of January, at a special term, to be held at Sandy Hill, to change the place of trial to the county of Albany. The motion was made on the day mentioned in the notice, but the decision was reserved. On the 24th of February the defendant's attorney received from Mr. Justice ROSEKRANS the papers upon the motion, with an order changing the place of trial from St. Lawrence to Albany. The order bears date the 29th of January, 1857. A copy of this order was sent by mail to the plaintiff's attorneys on the same day.

On the 19th of February, the cause having been reached on the circuit calendar, was moved for trial, and no one appearing for the defendant, the plaintiff took an inquest; and on the 26th of February, judgment was perfected. The defendant moved to set aside the inquest and all subsequent proceedings for irregularity.

S. G. COURTNEY, *for plaintiff*.

JOHN H. REYNOLDS, *for defendant*.

HARRIS, Justice. There being no stay of proceedings in the case, the plaintiff was at liberty to proceed with the trial, and to take his inquest, but he did so at the risk of having his proceedings set aside, if the motion to change the place of trial should be granted. It is a familiar rule that the court will never allow a party to be prejudiced by its own delay. Hence the practice of allowing a judgment to be entered *nunc pro tunc*, in case of the death of a party while the cause was *sub judice*. Had the motion to change the place of trial been denied, the inquest would have been regular. But the motion having been granted, the order took effect as of the time it was made. The delay of the court in announcing its decision

will not be allowed to operate to the prejudice of the party in whose favor the decision is made. It is now adjudged that on the 29th of January, when the motion was made, the defendant was entitled to have the venue in the action changed to Albany. The defendant had done all that was required of him. It was the fault of the court that the venue was not then changed. The decision was delayed because the court was not advised what should be done. This delay must not be charged to the account of the defendant. The court having determined the question, must give effect to the decision as of the time when the defendant became entitled to it. The venue was, therefore, in effect, changed from the time the motion was made. (*See Crawford agt. Wilson, 4 Barb. 524, and cases there cited.*) It follows that the proceedings at the St. Lawrence circuit, after the motion to change the venue was made, were irregular.

This motion must, therefore, be granted, with costs.

SUPREME COURT.

WILLIAM H. KELSEY and GEORGE J. DAVIS agt. JOHN M. COVERT, survivor, &c.

The notice in the summons, in an action upon an undertaking of bail given to procure the discharge of a party from arrest in a civil action, must be that prescribed by the 2d subd. of § 129 of the Code.

Such an undertaking is not for the payment of money; and the 1st subd. of § 129 is only applicable to an action to enforce a contract for the payment of money.

The proceedings to obtain judgment in an action on such an undertaking, on default of the defendant to answer, must be according to the 2d subd. of § 246 of the Code; and the court may order the damages to be assessed by a jury.

Serving notice of a motion in an action, on the plaintiff's attorney, signed by an attorney, as "att'y. for the def't." is a sufficient notice of appearance by the defendant.

Like notice of the assessment of damages by a jury, on a writ of inquiry, is neces-

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nary, as is required on an assessment by the clerk, where the defendant has appeared in the action.

Steuben Special Term, Nov. 1857.

MOTION by defendant to set aside the assessment of damages and subsequent proceedings, for irregularity.

J. KERSHNER, *for defendant.*

A. A. HENDEE, *for plaintiffs.*

T. R. STRONG, Justice. The notice in the summons in this action is that prescribed by the 2d subd. of § 129 of the Code, that if the defendant shall fail to answer, the plaintiff will apply to the court for the relief demanded in the complaint. It is the proper notice in the case, as the undertaking of bail on which the action is founded is not for the payment of money, but is that the defendant in the action in which it was given shall, at all times, render himself amenable to the process of the court during the pendency of that action, and to such as might be issued to enforce the judgment therein. (*Code*, § 187.) It is stated therein, that the bail undertake, in a specified sum, but that is to fix an amount beyond which the bail will not be liable; they do not agree to pay that sum, nor are they liable to pay it, unless the damages from their principal not rendering himself amenable to process shall equal that amount. The extent of liability is those damages. The notice in the 1st subd. of § 129, that the plaintiff will take judgment for a sum specified therein, if the defendant fail to answer, is proper only when the action is to enforce a contract for the payment of money.

The case is, therefore, within the 2d subd. of § 246, as to proceedings to obtain judgment on default of the defendant to answer, and the court might, as was done on the application of the plaintiff, order the damages to be assessed by a jury.

The damages were thus assessed upon a writ of inquiry, but without the service of any previous notice of the execution of

the writ, and for the omission to give such notice the defendant seeks to have the assessment of damages and subsequent proceedings set aside as irregular.

The defendant had, before the expiration of the time to answer, served a notice of motion in the action on the plaintiff's attorney, signed by an attorney, as "att'y. for the def't, J. M. Covert," and this was a sufficient notice of appearance. The plaintiff's attorney had also recognized and treated the defendant's attorney as such in the action.

I am satisfied that notice to the defendant's attorney of the execution of the writ of inquiry was necessary. Notice, in this case, might not have been of any particular benefit to the defendant, but no distinction can be made between cases governed by the same provision—one general rule must obtain in respect to all actions for assault and battery, slander, &c., as well as actions like the present. It is obviously just that notice should be given in most cases, that the defendant may have an opportunity to be heard as to the damages, and I cannot think it is contemplated by any part of the Code that notice may be dispensed with. The defendant has a right to appear on the assessment and mitigate the damages, in cases where matter in mitigation exists, in like manner as before the Code. There does not appear to be any express provision in the Code for such notice, but there is nothing inconsistent with it, and I think that under § 469, providing that the rules and practice in force at the adoption of the Code where consistent with it, should continue in force, subject to the power of the respective courts to relax, modify or alter the same, rule 21 of the rules of 1847, as to this point, is in force, and applicable to the case. By that rule, the same notice, in cases where notice is necessary, that is where the defendant has appeared in the action, of executing the writ of inquiry, shall be given as is required on assessment by the clerk. The object of this provision was to make the practice uniform as to notice in cases of assessments by the clerk and assessments by jury, and it will accord with the spirit of the rule to preserve that uniformity by following as to assessments by jury the

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change which has been made in the length of notice of assessment by the clerk.

The motion is granted, and \$10 costs are allowed to the prevailing party on the motion.

SUPREME COURT.

BILSBOROW agt. WILLIAM H. TITUS.

SAME agt. PETER H. TITUS.

Where deeds were executed in pursuance of a *parol partition*, made many years before, with a legal purpose, and fully carried into effect, each party taking possession of the portion allotted to him;

Held, that although the instruments vesting the severalty in each, were executed at a time when one of the parties had become *insolvent*, and after the institution of legal proceedings against him, and although the practical effect of this was to protect the property from the creditors of such insolvent party, yet it was not the original design (which was legal and proper), in executing the deeds. It was not, therefore, within the meaning of the act which renders void deeds made with the intent to hinder, delay or defraud creditors.

New-York Special Term, April, 1857.

THESE actions were brought to set aside conveyances in partition, and a lease of certain premises in the city of New-York, executed by George H. Titus.

PLATT, GERARD & BUCKLEY and PALMER & TAYLOR,
for plaintiff.

STEPHEN P. NASH and S. W. & R. A. GAINES, *for*
defendants.

CLERKE, Justice. The deeds sought to be set aside in these cases, except the assignment of the lease of the premises in Chrystie street, were executed pursuant to a *parol partition*, made many years before, with a legal and suitable purpose,

and fully carried into execution ; each party taking possession of and enjoying the portion allotted to him. To be sure, the instruments, vesting the severalty in each, were executed at a time when one of the parties had become insolvent, and after the institution of legal proceedings against him. But, although the practical effect of this was to protect the property from the creditors of George H. Titus, against whom these proceedings were commenced, yet this was not the original design, which, as I have said, was legal and proper. By executing the deeds he was fulfilling an engagement, which in law and conscience he was bound to perform before. It was not, therefore, within the meaning of the act which renders void deeds made with the intent to hinder, delay or defraud creditors.

With regard to the assignment of the lease to William H. Titus, this was executed for a full consideration, which was paid at the time of the execution and delivery of the instrument. The evidence on this point is positive, and has not been questioned.

The parties, at the time the parol partition was made, were solvent, and in all respects competent to make it. It was complete ; and, if it was not a perfectly equal partition, that was a fit subject for their consideration at the time, and cannot be inquired into now. The parties were satisfied with it ; and if the partition was valid at all, it cannot now be disturbed. A reference, therefore, cannot be allowed, even if otherwise proper, to ascertain whether any sum is equitably due to the estate or to the creditors of George H. Titus, by reason of any possible irregularity of the partition.

Judgment for defendant, in each case, with costs.

SUPERIOR COURT.

GEORGE H. BUSSING and others agt. JOHN THOMPSON.

The defendant, prosecuting the business of a banker, the plaintiffs, in November, 1855, employed him to act as their banker, receive their deposits, collect their bills, &c., and credit them with the amount, agreeing he might use the moneys, and he agreeing to pay their drafts on him, when presented, and interest on the balances, at the rate of five per cent. They continued to act under this agreement, and on the 13th of August, 1857, the plaintiffs remitted to defendant a draft for \$4,000, payable the 25th, to be collected and passed to their credit, under this agreement. Defendant received it on the 15th, and collected it on the 25th, and used the money; on the 24th, he knew he was insolvent, and on the morning of the 25th, avowed his purpose to suspend, and did soon after the \$4,000 was collected.

Held, that defendant did not receive the money in a *fiduciary capacity*. His failure after he received, and before the maturity of the draft, did not annul the agreement between him and the plaintiff, or convert him into a trustee.

Also, that he did not convert the money to his own use, "wrongfully," within the meaning of that word, as used in the *Code*, nor was he guilty, in judgment of law, of a fraud, in using the money; nor was he guilty of a fraud, in incurring the obligation to pay the \$4,000 to the plaintiffs.

Therefore, also *held*, that the defendant could not be held to bail, in an action to recover the \$4,000, he having failed to pay it, on a demand made subsequent to his failure.

General Term, January, 1858.

Before DUER, Ch. J., BOSWORTH, HOFFMAN, SLOSSON and WOODRUFF, Justices.

THIS action comes before the court, on an appeal by the plaintiffs from an order vacating an order directing the defendant to be arrested and held to bail.

The moving and opposing affidavits present certain undisputed facts; up to and for several years prior to the 25th of August, 1857, the defendant was prosecuting extensively, the business of a banker, in the city of New-York. The plaintiffs reside in Cincinnati, Ohio. In November, 1855, they opened an account with the defendant as their banker. At that time an agreement was made between the plaintiffs and the defend-

ant, that defendant should receive and credit to the plaintiffs, all moneys deposited by them, and the proceeds of all drafts, bills and other securities, which they should remit to him for collection on their account. The defendant was to accept and pay the plaintiffs' drafts from time to time, as they should be presented, and pay and allow interest upon all balances of deposits and credits, at the rate of five per cent. per annum, as a compensation for the use of such credits and deposits.

Under this arrangement, the parties continued to transact business with each other, up to the suspension of the defendant's business, on the 25th of August, 1857.

The deposits made by the plaintiffs with the defendant, and by him passed to their credit, amounted in the whole to \$302,998.77, including credits for interest, under the said agreement, amounting to \$351.61. The plaintiffs had drawn on the defendant against these deposits and credits, from time to time, drafts amounting to several hundred in number, and to an aggregate amount of \$292,029.64.

The defendant was held to bail, by reason of his receiving and refusing to pay to the plaintiffs, on demand, \$4,000, proceeds of a draft, dated Cincinnati, 13th August, 1857, drawn by C. E. Nourse & Co., on Ketchum, Howe & Co., of N. T., and payable on the 25th of August, 1857. This draft was sent from Cincinnati by the plaintiffs to the defendant, on the 13th, with a check for \$199, and the two were received by the defendant, on the 15th of August, 1857. The item of \$199, was collected and placed to the plaintiff's credit on the 15th, and the bill for \$4,000 on the 25th of August, 1857.

The defendant's business was extensive, and required the employment of some eighteen clerks. So far, there is no dispute about the facts.

There is nothing tending to show that the defendant personally knew of the fact of the receipt of the bill for \$4,000, until after it had been collected by his clerks, and passed to the plaintiffs' credit.

There are affidavits which strongly tend to show that he did not.

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The particular facts relied upon as creating the right to hold the defendant to bail, are, that on the 24th of August, 1857, Thompson was insolvent and knew that fact, and had no balance whatever in bank or in his office, and on the morning of the 25th, before the \$4,000 draft was paid, told the cashier of the Bank of the Republic, that he had made up his mind to fail. Before the draft was collected, the balance due from the defendant to the plaintiffs was \$6,900, and after that \$10,900. The \$4,000 was demanded of the defendant on the 31st of August, 1857, and he did not pay it, alleging as a reason that he had failed.

The plaintiffs insist, that the \$4,000 was received by Thompson in a fiduciary capacity, and as a trustee for the plaintiffs, and that applying it to purposes other than paying the plaintiffs, was a wrongful conversion of it to his own use, and that the obligation to account for and pay over the money, was fraudulently incurred.

WM. STANLEY, *for plaintiffs and appellants.*

E. MORE, *for defendant and respondent.*

By the court—BOSWORTH, Justice. There is no ground for pretending that Thompson on the 15th of August, 1857, when he received the \$4,000 draft, was insolvent, or contemplated becoming so.

He received it pursuant to an agreement, under which he had then been acting nearly two years. That agreement made it his duty to collect the draft, and gave him a right to use the proceeds, and made him liable to pay interest on any balance of which it might form a part, until he was required to pay the balance itself.

There was no fraud in receiving or collecting the draft. It is urged, however, that having collected it, he should have deposited the proceeds to the plaintiffs' credit, with some depositary. But the agreement between the parties did not require this. So depositing it, would not have relieved him from a personal liability to pay the amount to the plaintiffs, if the

depository had failed, nor from his promise to pay interest, until payment of the principal should be demanded and made.

A person cannot be said to have received money in a fiduciary capacity, who receives it upon an agreement that he may use it in his own business and for his own purposes, and shall become a debtor for the amount, and shall pay interest at a stipulated rate, to be ascertained and struck, at times and from time to time, and in a manner previously agreed upon.

The defendant received the draft on the 15th of August, on an agreement to collect it, and that he might use the proceeds. Being solvent then, and not then contemplating insolvency, the agreement existing at the time he received it, and which determined his duties and rights, gave him authority to collect the draft, and use the proceeds in his own business.

We cannot accede to the proposition that his failure on the 25th, connected with knowledge on the 24th, that he had become insolvent, and the conclusion arrived at on the morning of the 25th, that he must fail, annulled the agreement under which the draft had been received on the 15th, and converted the defendant into a trustee of the plaintiffs, divested of all power or authority to use the proceeds, as it was agreed he might do, when he received the draft, and undertook to collect it.

The money, therefore, was not received in a fiduciary capacity. The use made of it was authorized by the agreement under which the draft was received, which agreement had been acted upon nearly two years, and under which the defendant had received and collected moneys for which he had made himself the plaintiff's debtor, to more than \$300,000 in the aggregate. The relation between the parties was that of debtor and creditor, and not that of trustee and *cestui que trust*.

There was no conversion of the moneys to the defendant's use, wrongful, in judgment of law.

There was no fraud in contracting the debt or incurring the obligation for which this action is brought. The obligation was incurred and was complete when the draft was received. It was received in good faith, under an agreement subsisting at the time, which covered the whole matter of collecting the

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draft, the disposition of the proceeds, and prescribing the time when the amount should be paid to the plaintiffs, and the interest to be allowed by the defendant for the use of it, until payment should be made.

The defendant has done whatever he has done, down to and including the collection of the draft and the use of the money, as the plaintiffs agreed he might do. His right to use it, and his liability to pay interest, resulted from the agreement under which the draft was received. And the state of things then existing must be looked at to determine whether the defendant's liability was fraudulently incurred, as he has conformed in all respects to his agreement, except to pay the money when the plaintiffs demanded it. Being a mere debtor for the amount, it cannot be said that he was guilty of a fraud in contracting the debt, when there is no just pretence for saying that he was guilty of any fraud or bad faith, in making the agreement under which he received the draft, without he received it under such agreement, knowing or suspecting that he would not be able to perform it.

So far as the actual intent of the defendant in any part of the transaction is involved or is material, there is no reason to conclude that he personally knew of the receipt or collection of the draft, until after his business was suspended. And it may also be observed that, as to the item of \$199, which was remitted in the same letter with the \$4,000 draft, no point is made in the affidavits, that the liability of Thompson for that, is one in respect to which the right to hold him to bail exists.

We are of the opinion, that upon the facts established by the affidavits, on which the order appealed from was made, the defendant did not "wrongfully convert the property of the plaintiffs."

That he was not acting "in a fiduciary capacity," in collecting the draft and receiving the amount of it.

That he was not "guilty of a fraud in contracting the debt or incurring the obligation for which this action is brought,"

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or in "disposing of the property," the proceeds of the draft, which it is alleged he has converted to his own use.

Unless some one of these facts have been established, it is not claimed that any ground has been shown to exist, which, by the Code, gives the right to hold the defendant to bail. The order must, therefore, be affirmed.

COURT OF APPEALS.

CHARLES L. WHITE agt. ROBERT BULLOCK.

Before the act of 1849, to amend the Revised Statutes, relative to commissions to executors and administrators, the Revised Statutes gave the compensation to the *executors in general terms*, without providing for any apportionment among them upon equitable principles.

Consequently, where there were several executors, the compensation was to be divided *equally* among them. This right to compensation was a strict statutory right, not depending upon any equities whatever, and each was entitled to what the statute gave.

And it is doubtful whether even the surrogate, notwithstanding his plenary jurisdiction over the whole subject of the settlement of estates, had power to deprive either of the executors of any portion of the compensation to which he would be entitled by the terms of the statute.

By the act of 1849, which now governs this matter, it is provided that, "on the settlement of the account of an executor or administrator, the surrogate shall allow to him for his services, and if there be more than one, shall apportion among them, according to the services rendered by them respectively, over and above his or their expenses."

- "1. For receiving and paying out all sums of money, not exceeding one thousand dollars, at the rate of five dollars per cent."
- "2. For receiving and paying any sums exceeding one thousand dollars, and not amounting to five thousand dollars, at the rate of two dollars and fifty cents, per cent."
- "3. For all sums of above five thousand dollars, at the rate one dollar per cent ; and in all cases such allowance shall be made for their actual and necessary expenses as shall appear just and reasonable."

In an action by one executor against his co-executor, for an equal proportion of the executor's commissions, where the defendant had received and paid out

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nearly all the funds of the estate, as appeared by the final accounting before the surrogate, in 1848; *Held*, that the plaintiff was entitled to his equal half of such commissions.

September Term, 1857.

THE plaintiff and defendant were the executors of the will of John M. Mounsey, deceased. The plaintiff sued for one-half of the commissions allowed by the surrogate on the formal settlement of the affairs of the deceased, contending that he was entitled to an equal half of the commissions; and the defendant, that the plaintiff had incurred no responsibility and rendered no services, except a joint liability for \$121, and so was entitled to commissions only on the last sum.

The plaintiff produced the decree of the surrogate, dated March 9th, 1848, on the final accounting. That expressly declared, that the executors were debited with \$121, and that they were allowed \$121, by payments towards funeral expenses. This was charged and credited to both executors.

It was also declared that the rest of the moneys received, amounting to \$10,233.59, except the above \$121, were received by and debited to Bullock, the defendant, alone, and not jointly by him and his co-executor.

The payments also, amounting to \$4,656.66, except this sum of \$121, were made by and credited to Bullock alone, and he alone was ordered to pay out the balance of the property remaining after payment of the debts, and all the commissions thereon were ordered by the surrogate to be paid to him—the inventoried effects of the personal estate.

The circuit judge charged the jury, that if the surrogate's decree had passed upon the amount of commissions to be received by each executor, it would have been conclusive, if that were a matter then within his jurisdiction, as to which no opinion was expressed. But as it stated only the amount that was to be paid to both executors, that amount must be divided between them in proportion to services rendered by each executor; and that without any other proof of those services, it was to be determined by the amount stated by the decree to have been received and paid out by them respectively. That if it

had been proved that the plaintiff had rendered service in aid of the receipt and paying out of the \$5,807.78, received by Bullock, or had become liable jointly with him for the amount or for part of it, he would have been entitled to a fair compensation for that service.

The counsel of the plaintiff excepted to the charge as given. The jury after retiring, returned and asked the justice if the plaintiff was not equally responsible with the defendant for the estate.

His Honor informed the jury, that the plaintiff was not so liable, merely from being a co-executor, and that there was no proof that he had done any act to make himself responsible, except as to the \$121, and that the surrogate did not hold him responsible except as to that sum. To this the plaintiff's counsel excepted.

The plaintiff's counsel then asked the justice to charge that an executor was always accountable for money received by his co-executor, if he aids or assents to its being received by his co-executor, or if it is in his power to prevent the executor receiving it.

The justice refused the request as too broad, and the plaintiff's counsel excepted. The jury rendered a verdict for \$3.50, in favor of the plaintiff.

A motion for a new trial was denied, and judgment for defendant affirmed with costs, at a general term, in the first district in June, 1855. MITCHELL, CLERKE and COWLES, Justices. From this judgment the plaintiff appealed to this court.

A. THOMPSON, *for appellant.*

PLATT, GERARD & BUCKLEY, *attorneys, and*
JAMES W. GERARD, *counsel for respondent.*

By the court—SELDEN, J. The Revised Statutes in prescribing the compensation to be allowed to executors and administrators upon the settlement of their accounts before the surrogate, gave *in terms* no power to the surrogate to apportion that compensation among them where there were several. It is

possible, as intimated by the chancellor, in *Valentine agt. Valentine*, (2 *Barb. Ch.* 480,) that even prior to the latter act, the exercise of such a power would have been considered within the general range of the surrogate's jurisdiction.

But upon the settlement of the executors' accounts in this case, which took place prior to the act of 1849, the surrogate made no apportionment; all that he did, which would have any bearing on this subject, was to adjust and settle as between the executors, the relative amounts which each had received and paid out.

Now, admitting as the learned judge upon the trial assumed, that the sums so raised and paid, would in the absence of all other proof afford presumptive evidence, were that question properly in issue, of the amount of service which each had rendered, yet it by no means follows that he was right in instructing the jury that they might apportion the compensation upon that basis.

As the Revised Statutes, upon which the question wholly depends, gave the compensation to the *executors* in general terms, without providing for any apportionment among them, upon equitable principles, the legal consequence clearly was, that when there were several executors, the compensation was to be divided equally among them, this right to compensation was a strict *statutory* right, not depending upon any equities whatever, and each was entitled to what the statute gave. The case is precisely analogous to that of two attorneys jointly employed in the same suit, under the old system of attorney's fees, one of whom had collected the entire taxed bill. In an action by the other to recover his share of the fees, no one, I imagine, ever supposed that the defendant could set up that he had performed more than half the labor, and was, therefore, entitled to a proportionate share of the fees. Were the legislature to appoint three commissioners to superintend the erection of some public building and to disburse the necessary funds, giving them a certain per centage upon the amount expended, by way of compensation, no one would contend in the absence of any agreement among themselves, that one could

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legally claim more than his rateable share of the compensation, on the ground that he had performed more of the labor than his associates.

Until the principle of equitable apportionment was introduced by the act of 1849, I doubt whether even the surrogate, notwithstanding his plenary jurisdiction over the whole subject of the settlement of estates, had power to deprive either of the executors of any portion of the compensation to which he would be entitled by the terms of the statute. But, however this may have been, I think it quite clear, that a court of law, in the absence of any direct action of the surrogate on the subject, could have no real power. This conclusion renders it unnecessary to pass upon any of the other questions raised upon the argument. The judgment should be reversed, and a new trial ordered, with costs to abide the event.

NEW-YORK COMMON PLEAS.

JOHN SEXTON agt. SAMUEL FLEET and CATHARINE, his wife.

In an action in equity, to reach the wife's separate estate, the property which the creditor proposes to reach, must be *stated* and *designated* in the complaint, and also the nature of the wife's interest in it, must be stated, to enable the court to frame its decree in such a manner as to secure the equitable debt with as little injury to the separate estate as possible. The decree must specify out of *what property* the debt is to be paid.

Formerly, when bills have been filed to enforce a charge upon the wife's property, merely averring that she had a separate estate, without stating its character, nature or kind, they have been dismissed.

Special Term, December, 1857.

Before Hon. C. P. DALY, Judge.

THE complaint in this action, alleges that the defendant Catharine Fleet, who is the wife of the defendant Samuel Fleet, made a certain instrument in writing, whereby in consideration of one dollar to her paid, she guarantied the payment of a certain note, made by the defendant Samuel Fleet,

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for \$150, and delivered to Patrick McHill, and by him transferred to James McMullens, who transferred the same to the plaintiff, and held her separate estate liable for the payment of the same.

That said guaranty was written on the back of said note, and when the note became due and payable, payment was demanded and refused, and notice given to the defendant Catharine Fleet.

That at the time of the making of said note and guaranty, the defendant Catharine Fleet was, and still is, possessed of certain property and real estate in her own right, and as her separate estate and property, and that the said note was given by the defendant Samuel Fleet, in payment for services performed towards the erection of certain buildings upon premises owned and belonging to the said defendant, Catharine Fleet, in her own right, and as her separate estate and property, and that the guaranty aforesaid, was accepted on the credit of the said separate estate and property of the said defendant, Catharine Fleet, and that the further consideration thereof, was the services performed upon her said property, (without describing such property.)

And prays judgment that the amount of said note with costs of protest, interest, and costs of the action, may be decreed and declared a charge upon the property and separate estate of the said defendant, Catharine Fleet, (without describing it,) that the plaintiff be paid his claim and costs, and that a receiver be appointed for that purpose, and the separate property of the said Catharine Fleet, may be sold by and under the direction of this court.

To which complaint the defendants interposed a demurrer, and specified among other things, as the ground thereof, that the complaint did not state facts sufficient to constitute a cause of action.

H. P. TOWNSEND, *for plaintiff.*

JOHN MOODY, *for defendant.*

DALY, Judge. This complaint is defective. It alleges that

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the defendant Catharine Fleet was, and still is, possessed of certain property and real estate, in her own right, and as her separate estate and property, and prays that the debt, for the recovery of which the action is brought, may be decreed and declared a charge upon her property and separate estate; that the plaintiff may be paid the amount of his debt out of the same, together with his costs, and that a receiver may be appointed for that purpose, and that her separate property may be sold under the direction of the court, and the plaintiff paid out of the proceeds of the sale.

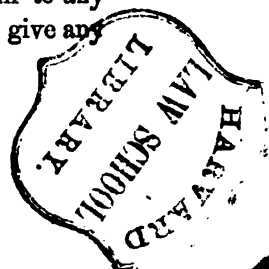
To enable the court to give the equitable relief asked for, the complaint should set forth the property upon which the debt is to be declared a charge, and which is to be applied in payment of it. In actions of this description, the court can make no personal decree against the wife. (*Rogers* agt. *Judson*, 3 *Sand. S. C. R.* 109; *Cobine* agt. *St. John*, 12 *How.* 333; 2 *Story's Equity Juris.* § 29, and 1397 to 1400.) The proceeding is *in rem*, (*Ashton* agt. *Aylett*, 2 *Mylne & Craig*, 111,) the object being to reach her separate estate, which she may be presumed to have charged by appointment with the payment of the debt, (*Vanderheyden* agt. *Mallory*, 1 *Comst.* 452,) or at least so much of it as will be sufficient to satisfy the plaintiff's claim: "As creditors," says Lord COTTENHAM, in *Owens* agt. *Dickinson*, (1 *Craig & Phillips*, 48,) "have not the means at law of compelling payment of such debts, a court of equity takes upon itself to give effect to them, not as personal liabilities, but by *laying hold of the separate property* as the only means by which they can be satisfied." The property, therefore, which the creditors propose to reach in equity, must be stated, and the nature of the wife's interest in it, that the court may frame its decree in such a manner as to secure the equitable debt with as little injury to the separate estate as possible. Thus, if payments are coming due to the wife out of a particular fund, the court will decree that the payments be applied to the satisfaction of the debt, if they are sufficient for that purpose, without impairing the fund, as was the case in *Stuart* agt. *Kirkwall*, (3 *Madd.* 389,)

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and *North American Coal Co. agt. Dyett*, (7 *Paige*, 9,) or if she have real estate, they will direct that the rents and profits be applied as was done in *Bulpin agt. Clark*, (17 *Ves.* 365.) Wherever this equitable relief has been granted to a creditor, he has set forth in his bill or complaint, the particular property out of which he has asked to have the debt satisfied, (*Vanderheyden agt. Mallary*, 3 *Barb. C. R.* 9; *North American Coal Co. agt. Dyett*, 20 *Wend.* 570, and in all the cases collected in the *English and American notes to Hulme agt. Tenant*, 1 *White's Leading Equity Cases*; *Law Library*, Vol. 66, p. 394; *Macquean on Husband and Wife*, 294; 1 *Danl's. Chan. Practice*, 205,) and when bills have been filed to enforce a charge upon the wife's property, merely averring that she has a separate estate, without stating its character, nature or kind, they have been dismissed. In *Francis agt. Wiggall*, (1 *Madd.* 258,) the bill was filed to compel the defendant and his wife, to purchase an estate, setting forth that the wife had separate moneys and property of her own to a larger amount than the purchase money; but it was dismissed because it did not state the nature of the property, whether real or personal, or what power she had over it, or whether it could be made available to answer the plaintiff's demand; and in *Aylett agt. Ashton*, (1 *Mylne & Craig*, 105,) the bill was to compel a married woman to execute a lease, but the bill was dismissed, because it did not sufficiently appear what interest she had in the premises she had agreed to lease.

The power to compel the application of the separate property to the payment of the debt being exclusively in equity, the decree must specify out of what property it is to be paid. If the defendant, therefore, should suffer the case to go by default, we could give the plaintiff no relief, as he has not pointed out in his complaint any fund or any particular property which the court by its decree could direct to be applied.

The demurrer of the defendant is well taken, as the complaint does not disclose a case entitling the plaintiff to any equitable relief, or rather upon which the court could give any equitable relief.



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SUPREME COURT.

WILLIAM PHIPPS and others agt. JOHN G. VAN COTT and others.

In an action against several defendants, each defendant or set of defendants, appeared by separate attorneys, and demurred to the complaint, raising a distinct issue of law, and the special term ordered judgment for the defendants severally, with costs upon the demurrers, and that the complaint be dismissed with costs, unless the plaintiffs should amend and pay costs of the demurrers within twenty days, (in one order). On appeal to the general term, within the twenty days by the plaintiffs, from the "order," (as it was termed in the notice of appeal,) directing judgment for defendants on the demurrers, &c., the defendants moved to dismiss the appeal, on the ground that it should have been taken as an appeal from a *judgment*, and not from an *order*, which motion was denied, on the ground that the appeal having been taken within the twenty days allowed to amend on terms, was properly taken as from an order.

The general term decided (on argument of the appeal on the merits,) that the order on the demurrers be *reversed*, and that plaintiffs have judgment against the defendants on the several demurrers, *with costs*, with leave for the defendants severally to answer on payment of costs, within twenty days.

The question was, what *costs* the plaintiffs were entitled to, to enable the defendants to answer? The plaintiffs claimed separate bills of costs against the several defendants, who appeared and demurred severally; and also that they were entitled to the costs of the appeal as if taken from a judgment.

Held, 1. That the plaintiffs were entitled to all the *disbursements* which had been incurred by them in consequence of the numerous appearances put in by the defendants, and the multiplied proceedings which had necessarily resulted.

2. That the expense of *printing the case and points* might properly be included in the costs.

3. That the plaintiffs were only entitled to a *single bill of costs* against all the defendants, if the action proceeded against all of them. (*See Comstock agt. Halleck, 4 Sand. 671, adverse.*)

4. That the plaintiffs were entitled to recover for the appeal in this case, the proper costs of the trial of an issue of law. These costs, as well as all the costs of the cause, were to be regulated by the Code, since the late amendments, (April, 1857.)

"Proceedings before notice of trial, \$15," charged in the bill, would not be allowable, unless on entering *judgment final* for plaintiffs. It was no part of the costs then to be paid by the defendants for amending.

"Subsequent proceedings before trial, \$10," was to be paid upon amending

"Three term fees \$30," was proper if the case was on the calendar as specified

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in sub. 7 of § 307. The trial fee at the special term, was of course, properly charged.

The items of \$15 and \$30, for the appeal, before argument, and for the argument, were disallowed, and in their place the charges relating to the trial of an issue of law, substituted.

Besides the trial fee, and the proper term fees of the terms, there might be allowed \$10, under sub. 3 of § 307, for all proceedings subsequent to notice of trial, and before trial. The notice of argument being in effect a notice of trial.

Second District General Term, Brooklyn, October, 1857.

Present, S. B. STRONG, LUCIEN BIRDSEYE, JAMES EMOTT, Justices.

THE plaintiffs commenced this action against John G. Van Cott, as a judgment debtor, execution against whom had been returned unsatisfied, and against fourteen other persons, who were alleged to have taken conveyances and assignments of different parcels of the debtor's property; which were alleged to be fraudulent, collusive and void.

The defendant Johnson appeared separately, and moved that certain portions of the complaint be made more definite and certain. The defendants, John G. Van Cott and others, appeared by another attorney, and made the same motion, but extending only to a portion of the matters specified in the other notice. The infant defendant, G. W. Van Cott, appeared by his *guardian ad litem*, and demurred to the complaint. Luqueer and wife appeared by still another attorney, and demurred to the complaint. Debevoise and wife appeared by another attorney and also demurred to the complaint. The defendants Peter Hulst, Hannah Hulst, and Eleanor Meserole, also put in three several demurrers to the complaint, but all by the same attorney. All the six demurrers were to the whole complaint, and presented substantially the same objections to it. The motions and demurrers were brought to a hearing at the special term; and on the 25th of February, 1856, the special term ordered judgment for the defendants, who had demurred severally, with costs, upon the said demurrers, and that the complaint be dismissed with costs, unless the plaintiffs should amend their complaint and pay costs of the demurrers, within twenty days. On the 26th of February, 1856, the motions to

make the complaint more definite and certain, were granted, with costs. One order was entered on both motions, and one decision on all the demurrers.

On the 8th of March, 1856, the plaintiffs appealed to the general term from the order on the motions, and also from the "order," (as it was termed in the notice of appeal,) directing judgment for the defendants on the demurrers, &c. One notice of appeal related to the order on the motions, and one notice to the decision on the demurrers.

This latter appeal, the defendants moved to dismiss, at the January general term, 1857, on the ground that it was improperly made, that it should have been made as an appeal from a *judgment*, and not from an *order*. The motion was denied, the court holding that the appeal was properly taken from the decision on the demurrers as an *order*. It being taken within the twenty days given by the order for amending the complaint on terms. (*See 4 Abbott, 90.*)

Both appeals were argued at the general term, which court subsequently decided that the demurrers should have been overruled, and the motions denied in the court below, and that the orders appealed from must be reversed, with leave to the defendants to answer in the court below, *on the payment of costs*.

The order entered on this decision, fixed the costs of the plaintiffs on the motions, at \$10, for opposing the motions below, and \$10, for the appeal. It provided that the order on the demurrers be reversed, and that the plaintiffs have judgment against the defendants on the several demurrers, with costs, with leave for the defendants severally to answer, on payment of costs within twenty days.

The plaintiffs moved that the court direct what costs should be paid, to entitle the defendants to answer, and fix the amount thereof, or refer it to the clerk or some other person, to adjust the same. No objection was made by either party to the form of the order entered at the general term. The plaintiffs claimed separate bills of costs, against the several defendants, who appeared and demurred severally; and also that they

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were entitled to costs of the appeal, as if taken from judgments.

Various objections were made by the defendants, which are stated in the opinion of the court. Five other actions were brought by as many different plaintiffs, against the same defendants; the proceedings in those actions were the same as in this one, down to the argument at the special term, from which time all the cases were to abide the event of this one.

JOHN W. EDMONDS, *for plaintiffs.*

W. J. COGSWELL and P. J. FISH, *for defendants.*

By the court—BIRDSEYE, Justice. Whatever may be thought as to the other questions in the case, there can be no doubt the plaintiffs are entitled to all the disbursements which have been incurred by them, in consequence of the numerous appearances put in by the defendants, and the multiplied proceedings which have necessarily resulted.

Nor do I doubt that the expense of printing the case and points, may properly be included in the costs. The 30th rule of this court requires that the cases and points, and all other papers furnished to the court at a general term, in calendar causes, shall be printed. Enumerated motions include among others, by rule 27, "issues of law." By rule 28, these are to be noticed for the first day of term, by either party. By rule 34, notes of issue in such causes, are to be filed, and a calendar made up and printed by the clerk, for the use of the court. By rule 28, the papers to be furnished on such motion, shall be a copy of the pleadings, when the question arises on the pleadings, or any part thereof, or of such parts only as relate to the question raised by the demurrer.

This rule does, indeed, specify that the papers to be furnished, shall be furnished by the party demurring, in case of demurrer. But this portion of the rule took its present form before the provisions of the Code were enacted, (§§ 252, 255,) which require that the trial of issues of law, be had at the circuit court or special term. Since these provisions, no "issues

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of law," and no "questions arising on the pleadings," can come before the general term, except upon appeal. And the equity of rule 29, which requires the appellant to furnish the papers on the appeal, (though the strict language of that rule may, perhaps, not apply to this case,) must be held to govern a case like the present, when from the changes of the statute, and the want of adaptation thereto in the rule, it has become inapplicable and of course inoperative.

The next question which arises is, whether the plaintiffs can have a several bill of costs against each defendant, or set of defendants, appearing separately, and raising by demurrer a distinct issue—or only a single bill of costs, against all the defendants. The first position is urged by the plaintiffs; the other by the defendants. The point is not free from difficulty; the claims of each party are apparently sustained by some of the authorities.

It will hardly be denied, that each defendant who had a separate interest to be defended, and who appeared severally by an attorney, not connected in business with the attorneys of the other defendants, and in the absence of circumstances indicating any oppressive or unfair design in severing the defences, would, if finally successful, be entitled to the costs of his separate defence. The rule is too well settled to admit of dispute. (6 *Hill*, 267.) It does not extend so far, however, as to give one attorney, who appeared for three defendants and put in three several demurrers, one for each of them, but all three in the same precise form, three separate bills of costs. That was claimed by one of the attorneys in this case, in regard to his costs at the special term, but the claim is clearly untenable.

The plaintiffs claim that the converse of the main proposition is true; and that where the defendant would recover separate bills of costs if successful, they shall pay separate costs, if unsuccessful.

In *Comstock* agt. *Halleck*, (4 *Sandf. S. C. R.* 671,) two defendants put in separate answers, but by the same attorney, to which the plaintiff demurred. The demurrers were heard at

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the special term, and allowed, with leave to the defendants to amend on the payment of costs. Mr. Justice DUER, held, with the concurrence of all his associates, that the plaintiff was entitled to tax against each defendant a separate bill of costs on his demurrer to each answer, "the defences being several, and a distinct issue of law raised by each." He added: "Defendants can always obviate this consequence by joining in their answer."

In *Everson* agt. *Gehrman*, (2 *Abbott*, 413,) three of the defendants joined in an appeal from the special to the general term. The notice of appeal was signed by three different attorneys, and was of one appeal. The respondent's attorney was obliged to give notice to each of the attorneys, and although there was but one set of papers, one argument, and one judgment, either at the special or the general term, he claimed three separate and full bills of costs. Mr. Justice WHITING held, that he was entitled to but one bill of costs.

In *Buell* agt. *Gay*, (13 *How. Pr. R.* 31,) Judge HARRIS reviewed the decision in *Comstock* agt. *Halleck*, and said, that in his opinion, it could not be defended; that it gave to the plaintiff what the law had not awarded to him.

I am compelled to say that the positions laid down in this opinion, commend themselves to my judgment, in preference to those of *Comstock* agt. *Halleck*. They accord much better both with the language and the principles of the present statutes on the subject of costs. They accord, too, with what is stated in *Freiot* agt. *Adams*, (5 *How. Pr.* 138,) to be the well settled rule of the former practice that but a single bill of costs can be taxed in the same action in favor of the same attorney.

I see nothing in the present statutes indicating a design to change this rule, although it is manifest that it is now less reasonable and just, than it was when the attorney for the successful party made up his bill of costs by charging for specific services, and was thus enabled to obtain compensation for most, if not all the additional labors, imposed by the defendants appearing and pleading severally. The principle of the present system of costs, is not to make the statutory costs the

measure of the attorney's compensation, but to leave that to the voluntary arrangements of the party and attorney. It designs to give to the successful litigant only, certain fixed sums by way of indemnity for his expenses in the action. These sums are, excepting the comparatively small range of actions in which additional allowances may be given, the same in all cases, in the most complex and difficult equity suits, as in the simplest actions on contracts, or for acknowledged wrongs. The power of adapting this rigid Procrustean rule, to the justice of each particular case, which the former system of allowance, to a certain extent afforded, is by the late amendments, very much narrowed, and assimilated to the fixed rates of costs prescribed in section 307.

I therefore conclude that the plaintiffs are only entitled to a single bill of costs, against all the defendants, if the action proceeds against all of them. It is probable, as was suggested at the argument, that this will prove a very inadequate compensation to the successful attorneys, and will be far less than the attorneys for the defendants had claimed on the decision below, and would have been entitled to, if they had succeeded on the appeal. But for this inadequacy of compensation, the court are in no manner responsible. We are to administer the statute as to costs, as we find it. *If* it needs any amendment, in order to subserve the purposes of justice, a different tribunal must be applied to.

It must not be overlooked, however, on this point, that there was but one trial, and a single decision in the court below, but one appeal, one argument on it, and one decision and order of the appellate court. And though here the costs, if taxed severally against each defendant who has raised a separate issue, might be a just compensation for what the court sees to have been the labors of conducting this cause, the same might not be true in other cases; and the practice, if adopted, might lead to great abuses, and might become very oppressive in its operation.

The next question in this case, relates to the amount of costs which the appellants can recover on their appeal, whether

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it shall be under sub. 5 of § 307, fifteen dollars before the argument; thirty dollars for the argument, and the term fees allowed by sub. 7 of the same section; or whether it is to be the sum of \$10, for the costs of a motion; or whether it shall be the costs of a trial of an issue of law.

Obviously, the first-mentioned rate of costs cannot be allowed. This is an appeal in one of "the cases mentioned in section three hundred and forty-nine." It is, therefore, by sub. 5, of § 307, expressly excluded from the class of cases, in which the two items of \$15 and \$30 can be allowed. The plaintiffs when they appealed, clearly intended to appeal in the manner provided by § 349. That is obvious from their notice of appeal. They succeeded in defeating the motions to dismiss their appeal, at the general term, on the precise ground that they had so appealed. They cannot now claim a rate of costs, from the benefit of which all are excluded by the plain words of the statute, who appeal as they did, and intended to do.

Can the costs of a motion be allowed here, under § 315? I think not. It was well said in *Thomas agt. Clark*, (5 *How. Pr. R.* 375,) that the motions for which that section was designed to provide, were the collateral applications to the court, such as to vacate or set aside some proceeding, or for special relief, and which were not in the direct and regular progress of the suit. The history of the prior legislation on that subject, which is that given by the learned judge, seems to warrant the conclusion that § 315 of the Code should have the same interpretation as if it had provided that costs might be allowed on *special* motions. It may be added, too, that § 315 seems intended to cover a class of proceedings which is not mentioned and provided for in any previous section of that title. (*And see Ellsworth agt. Gooding*, 8 *How. Pr. R.* 1.)

But it may well be doubted whether this appeal was in any sense a motion, within the meaning of the Code, (§§ 400, 401.) The demurrers were to the whole complaint. When the general term decided the questions presented by these demurrers, not only was the erroneous order of the special term reversed,

but it was directed, "that the plaintiffs *have judgment against* the said defendants on the said several demurrers, with costs." It is true that leave was given to the defendants to answer on terms. The judgment was, so to speak, *defeasible*. But if the conditions were not complied with, the judgment became absolute. In that event, the "application for" that "direction of the court," would not be "a motion," under §§ 400, 401. I incline to think that this "application," must have its definition at the time it is made. It must then be classified according to its own nature and character, and not from that of its future result. It cannot be vague or undefined, till it shall be seen by the event whether the court will make the judgment defeasible, or whether the terms on which it may be defeated shall be complied with, and then take its shape accordingly. The decision already made, is "the final determination of the rights of the parties in the action," (§ 245.) As those rights are now presented by the pleadings, it would bind the parties as a judgment, in all cases where they should attempt to raise any questions as to the same "rights." It is, therefore, properly a "judgment." And it does not lose that character, because the defendants have the privilege of spreading new allegations on the record, and making a defence substantially different from that already made. Whether the decision will also finally determine the "action," as well as "the rights of the parties" to it, as now presented, is not yet known, and cannot be, until the time allowed the defendants for paying costs and answering, has expired. But, before that, we must determine what was the nature of the "application," on which such decision was made. And I think both good sense and logical consistency, require us to hold, that the application is not a "motion," within the definitions of the Code, when it presents the question whether the plaintiff is entitled to any judgment or relief whatever, and when the decision thereon will not only determine finally the rights of the parties to the action, as set forth by the pleadings, but will dispose of the action itself, unless the privilege of raising other issues is granted by the court.

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The plaintiffs cannot, therefore, recover the costs of a "motion," for their appeal, and will be without any indemnity for their expenses in this most important and difficult proceeding in the action, unless they can obtain the same as costs of the trial of an issue of law.

The 252d section of the Code defines a trial to be, "the judicial examination of the *issues* between the parties, whether they be issues of law or of fact." All the provisions of the chapter of the Code, of which this section is a part, do now contemplate, certainly, as § 255 provides, that this "trial," be had at the circuit or special term. And the provisions of the Code as first enacted, were in substance the same. (*Laws of 1848, p. 536, § 210.*) But by this section as it was amended, and became section 255 of the Code of 1849, issues of law were only to be tried "in the *first instance*, at a circuit court or special term." By the same section as amended in 1851, "issues of law must be tried at a general term, unless the court order the trial to be had at a special term."

In the amendment of 1852, the section took its present shape. But prior to that time, whether the trial of issues of law was had at the general or special term, the fee for it was that fixed by § 307.

It was thought more consistent, however, to require all cases to be first heard and decided by a single judge, and to make the general term more strictly a court of review and appeal. While this principle was taking form, and becoming a part of our growing judicial system, the amendments to section 349, allowed the order of the single judge determining an issue of law, to be reviewed more speedily and with less formality, than was required for the review of a judgment when formally entered up. But no change was made in the provisions of the section which fixed the items of costs. The subject was either overlooked, or more probably it was supposed that the 307th section covered the case, so that no change was necessary. The doubt, for which the change in §§ 255 and 349, without a corresponding change in section 307, gave some room, was very early presented in *Van Schaick agt. Winne*, (8 *How*.

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Pr. R. 5,) which was decided by HARRIS, J. That learned judge held, that the prevailing party, on an appeal to the general term, from an order sustaining or overruling a demurrer, was entitled to a *trial* fee, as well at the general as at the special term. He said that such cases could not, in any proper sense, be regarded as motions, within the meaning of the term as used in the 315th section. He adds, "the hearing of such an issue, at the circuit or special term, is, as all will agree, a trial. The successful party claims and is entitled to a trial fee, for such a hearing. Nor is it the less a trial, because after one hearing before a single judge, the law provides for a rehearing at a general term." It will be seen on examination, that the hearing at the general term of an appeal from an order sustaining or overruling a demurrer, is as clearly "the judicial examination of the issues of law between the parties," as was the original hearing at the special term. That "issue" is the only thing examined or presented for examination.

This decision has remained, so far as my examinations show, wholly unquestioned. Although the case of *Ellsworth* agt. *Gooding*, (8 *How. Pr. R.* 1,) in which the same learned judge has held, that on a motion for a new trial on a case or bill of exceptions, the prevailing party was entitled to the same trial fee, as often as the cause is brought to a hearing upon the merits, has been once questioned. (See *Potsdam & Watertown R. R. Co.* agt. *Jacobs*, 10 *How.* 453, *per* HUBBARD, J.) The reasoning in that case, shows clearly that distinctions exist between the two cases in 8 *Howard*. And the views expressed by Mr. Justice HUBBARD, may be correct, without impugning the weight of *Van Schaick* agt. *Winne*, as an authority.

It was probably the doubt growing out of these adverse decisions of Judges HARRIS and HUBBARD, which led to the amendment made at the last session, in sub. 5 of § 307 of the Code, by which, costs as on an appeal from a judgment are now given for the proceedings which were supposed by Judge HUBBARD, to be unprovided for in the previous fee bill. It is a circumstance not undeserving of mention, that when the legislature was endeavoring to remove the doubt raised by the

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case of the *R. & W. R. R. Co.* agt. *Jacobs*, the question decided in *Winne* agt. *Van Schaick*, was left untouched. It cannot be supposed that they meant to leave appeals from orders sustaining or overruling demurrers, wholly unprovided for, and to deprive the successful party of all compensation.

I therefore conclude, that the plaintiffs are entitled to recover for the appeal in this case, the proper costs of the trial of an issue of law. These costs, as well as all the costs of the cause, are to be regulated by the statute, since the late amendments.

In the bill of costs which the plaintiffs have submitted, are contained the following items for services, viz :

Proceedings before notice of trial,	\$15.00
Subsequent proceedings before trial,	10.00
Three term fees,	30.00
Trial of issue of law,	15.00
On appeal before argument,	15.00
For argument of appeal.	30.00

The first item would be properly included in the bill, if it was made up for the purpose of entering judgment final for plaintiffs. But it is not a part of the costs now to be paid by defendants, for amending. For none of the proceedings to which it relates will be vacated by the operation of the order authorizing the amendment. (*Van Valkenburgh* agt. *Van Schaick*, 8 *How.* 271.) The next charge is to be paid upon amending. (See 8 *Id.* 273; 6 *Id.* 413; 5 *Id.* 336; 2 *Abbott*, 360.)

The third charge is proper, if the case was on the calendar, as specified in sub. 7 of § 307. The trial fee at the special term, is, of course, properly charged. The items of \$15 and \$30, for the appeal, before argument and for the argument, must be disallowed. And in their place, must be included the charges relating to the trial of the issue of law. Besides the trial fee, and the term fees of the terms, if any, at which the cause was necessarily on the calendar, and was not reached or postponed, we think there may also be included ten dollars, under sub. 3 of § 307, for all proceedings subsequent to no-

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tice of trial and before trial. The notice of argument is in effect a notice of trial. This will be a compensation for the preparation of brief and points for the hearing on the appeal, the noticing of the case and putting it on the calendar, and the labor of printing the papers for the appeal.

Only one other suggestion made at the argument requires remark. It was said by the plaintiffs, that if but a single bill of costs was allowed against all the defendants, there would be great difficulty in apportioning it among the defendants, so as to show what part of the bill each party desiring to answer, must pay.

There may be some confusion to arise on this point; but it is not properly presented here, and cannot now be disposed of. One thing is clear. The plaintiffs cannot be compelled to take part in any such apportionment. If the whole of the costs as adjusted are not paid to them within the period fixed for that purpose, the privilege of answering will be lost, and they will be entitled to final judgment. It behooves every defendant desirous of answering, to see that all the costs are duly paid. If any of them fails to pay a proportion of the bill as adjusted, and throws the burden upon the others, the injustice must be corrected between the defendants by some application or proceeding adapted to the case. The difficulties which may then arise, cannot affect the present case, or be thrown upon the plaintiffs.

An order must be entered, referring it to the clerk of Kings county, to adjust the costs of the plaintiffs, in conformity with the views above expressed.

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SUPREME COURT.

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The court has, and can exercise the essential inherent powers of efficiently controlling every proceeding in an action pending in it, so as effectually to protect every person actually interested in the result, from injustice and fraud; and it will not allow itself to be made the instrument of wrong in any respect.

And it is the duty of every judge upon the bench, exercising sound discretion and caution, to not only rectify proceedings in actions in the court, which are properly brought to its notice by the intervention of any person having an interest in the result, whether formally a party to the action or not, but to employ a vigilant eye, through every stage of the action, without waiting for the suggestion of others, for the purpose of avoiding and detecting the perpetration of any wrong which may be attempted by the instrumentality of legal forms.

As a general rule, none but parties on the record to an action, will be allowed to meddle with its management, or will be recognized as having any standing in court in relation to it, but even this rule must yield to the circumstances of the case.

For instance, a (judgment) creditor, not a party to the record, may move to set aside a judgment by confession, fraudulently made by his judgment debtor. So the court will not allow a trustee to concede away any portion of the trust estate without ample consideration, &c.

As a tax payer and an officer of the corporation, the *comptroller* of the city of New-York, may make an application to the court, on facts tending to show collusion, to set aside a judgment entered against the mayor, aldermen and commonalty, of the city of New-York, through the consent of their officials.

New-York General Term, December, 1857.

THIS was an appeal by the plaintiff, from an order made at the special term, setting aside a judgment and execution, in favor of the plaintiff against the defendants, for some \$200,000, and allowing the defendants to come in and defend, &c.

JOHN M. BARBOUR, D. DUDLEY FIELD, and WM. CURTIS NOYES, *for plaintiff.*

JAMES R. WHITING, *for defendants.*

By the court—CLERKE, Justice. I presume that it will not be disputed, even by the counsel for the plaintiff, that it be-

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longs to the essential, inherent powers of this court, to exercise such an efficient control over every proceeding in an action pending in it, as effectually to protect every person actually interested in the result from injustice and fraud, and that it will not allow itself to be made the instrument of wrong, no less on account of its detestation of everything conducive to wrong, than on account of that regard which it should unceasingly entertain for its own character and dignity. And it will not only rectify proceedings of this nature, when brought to its notice by the intervention of any person having an interest in the result, whether formally a party to the action or not, but it is the solemn and imperative duty of every judge upon the bench to employ a vigilant eye, without waiting for the suggestion of others, for the purpose of avoiding and detecting the perpetration of any wrong which may be attempted by the instrumentality of legal forms. This vigilance should be exercised through every stage of the action, from the issuing of the summons to the levying of the execution. This superintendence, and this exercise of power, should indeed be regulated by a sound discretion, and with the utmost caution. Rules, orders, and decisions of the court, deliberately made, should not be lightly disturbed.

As a general rule, none but parties to an action will be allowed to meddle with its management, or will be recognized as having any standing in court in relation to it. When the litigants consist of adults, not under restraint and not insane, acting in their own right, the presumption that every man is the proper director of his own interests, and the serious inconvenience that would ensue from allowing the unsolicited interference of persons not interested, render it expedient that the court shall lend no attention to any but the parties on the record. Even this rule must yield to the circumstances of the case. Even adult parties, apparently acting in their own right, and presenting themselves apparently in the adverse position of plaintiffs and defendants, may, by seeming to adjust only their mutual rights, compromise very seriously, and perhaps irrecoverably, the rights of others. The familiar instance re-

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ferred to on the argument, will at once present itself. Where one party confesses a judgment without consideration, or for too large an amount, or where it is not made in strict compliance with the directions of the Code, the judgment will be set aside on the application of a party not named on the record, but who is a creditor of the defendant. Now, on what principle is this interference allowed? Is it merely because the moving party has also obtained a judgment against the defendant? Even if this were the precise reason, it would be a very palpable instance of recognizing the right of a person not a party to the record to claim the interposition of the court in regard to it. But the reason of allowing this has no such restricted limits. In the particular instance referred to, indeed, the court will only hearken to a judgment creditor, because it is expedient to have his claim judicially established before it will be judicially recognized. But the broad reason for the interference of the court is that the plaintiff and defendant, in the fraudulent confession of judgment, have by their combined action employed its forms to accomplish an act which involves the interests of others, in the disposition of the property affected by the judgment; and whenever this is done the court has the essential inherent power to interfere; although as a general rule, as I have said, in order to avoid confusion and contention, it will not do so where the parties to the record are adults acting in their own right, and are free from restraint.

On the general principle which I have stated, the court would never allow a trustee to concede away any portion of the trust estate without ample consideration; and if he was a defendant in an action, and was about compromising the rights of his *cestui que trust*, by a confession, by letting a judgment go by default, by carelessness, or even by a palpably mistaken view of his duty, the court, at the instance of the person having the beneficial interest in the controversy, would interpose. The power of a trustee over the estate vested in him, exists only for the benefit of the *cestui que trust*, and in equity, trusts are so regarded that no act of a trustee will be recognized as valid, which is calculated to prejudice the *cestui que trust*, al-

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though a purchaser without notice will be protected. Courts are equally jealous in watching all the acts of a trustee by which the interests of the trust may be compromised. The instances quoted by the plaintiff's counsel, in which the court refused to recognize the acts of unauthorized persons to bind parties to a suit, have no application to this case. If the comptroller attempted during the progress of the suit to consent of his own accord to a reference or an arbitration, without any authority from the defendants, of course, the consent would not be binding on them, and would be entirely void; but by this application he does no such thing. As a tax payer, and as an officer of the corporation, particularly identified with the administration of its financial concerns, he presents himself before this court, and informs us that the defendants, who are in fact the mere trustees of the property, and the other interests of the people of this municipality, (the corporators of whom it is composed,) are, by their conduct in relation to the plaintiff's demand, wasting the property of their *cestui que trust*.

It is not necessary to suppose that this is a case of bribery or corruption, on the part of the individual members of the common council, or of any other officers of the city government, or that the counsel of the corporation has violated his faith and intentionally betrayed the city. It requires much stronger proof than I have discovered in the papers before me, to induce me to believe, that he for a moment, contemplated any injury to his constituents. That officer, and even the members of the common council, may be sincerely of opinion, that to litigate this claim would involve the city in considerable expense, without any reasonable hope of ultimate success, and, indeed, that seems to be the conviction of many others, who cannot be suspected of any unworthy motives to influence their opinion. But, it is enough for us on this appeal to be convinced that the court below had the power to interfere, and that the evidence of the facts on which it might rightfully interfere is such, that if they had been presented to a jury, and the jury had found in the same way, their verdict would be sustained. The title of the plaintiff had been con-

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demned by one court as to part of the property to be sold, and is now subject to doubts which can be removed only by a judicial investigation. On the evidence, a jury might have found as the court below has, that the value of the property was excessively overrated. The objection that by the terms of the resolution of the corporation, the contract was not then complete, but was to be made in form by the comptroller, also deserves consideration. These matters seem to have been overlooked at the trial. As they should be re-examined, we express no formal opinion upon them. The form of the judgment is also incorrect. The payment by the defendants should have been required on the plaintiff's executing and delivering to the defendants, (or filing in court for them if they refused to receive it,) a warranty deed of the premises, free from all incumbrances, (except as mentioned in the contract,) and with a good title in all other respects. Justice to all parties would be best promoted by modifying the order below, and allowing the answer and subsequent proceedings to be set aside, provided the comptroller or any other tax payer, who may be substituted in his place, shall within thirty days from a written notice of the entry of this modified order, file an original complaint as a tax payer, corporator, or otherwise, on behalf of himself and others, setting forth such matters, and making such parties, and praying such relief in the premises as he may be advised. In the meantime, let the plaintiff's proceedings in this action be stayed, and if another suit shall be commenced as above provided for, let the plaintiff's proceedings be further stayed until the final decision of the other suit. Let the plaintiff in the new suit give security in the sum of \$5,000. PEABODY, J., dissenting.

Mary Doedt, administratrix agt. Wiswall and others.

SUPREME COURT.

MARY DOEDT, Adm'x of CHARLES DOEDT, deceased agt.
EBENEZER WISWALL and another, Executors of EBENEZER
WISWALL, deceased, and others.

"Whenever the death of a person shall be caused by wrongful act, neglect or default, and the act, neglect or default is such as would (if death had not ensued), have entitled the party injured, to maintain an action and recover damages in respect thereof, then and in every such case, the person who, or the corporation which would have been liable, if death had not ensued, shall be liable to an action for damages, notwithstanding the death of the person injured, and although the death shall have been caused under such circumstances as amount in law to felony." (*Laws 1847, ch. 450, § 1.*)

"Every such action shall be brought by and in the names of the personal representatives of such deceased person, and the amount recovered in every such action, shall be for the exclusive benefit of the widow, and next of kin of such deceased person, and shall be distributed to such widow and next of kin, in the proportion provided by law in relation to the distribution of personal property left by persons dying intestate; and in every such action the jury may give such damages as they shall deem a fair and just compensation, not exceeding five thousand dollars, with reference to the pecuniary injuries resulting from such death, to the wife and next of kin of such deceased person, provided, that every such action shall be commenced within two years after the death of such person."

"Every agent, engineer, conductor or other person, in the employ of such company or person, through whose wrongful act, neglect or default, the death of a person shall have been caused as aforesaid, shall be liable to be indicted therefor, and upon conviction thereof may be sentenced to a state prison for a term not exceeding five years, or in a county jail not exceeding one year, or to pay a fine not exceeding two hundred and fifty dollars, or both such fine and imprisonment." (*Laws 1849, ch. 256, §§ 1, 2.*)

Held, that an action against a common carrier of passengers, brought by the personal representatives of the plaintiff killed, claiming damages under this statute, might be properly brought on *contract*. That is, the above statute (section second) by defining the claim of the personal representatives, to be founded on the *loss of property*, brings the case clearly within the rules allowing a waiver of the *tort*, and a *suit on the contract*. (*Does the Code admit of different FORMS of action on substantially the same facts constituting the cause of action? If the tort is not admitted on the statement of facts, can it be waived?* REPORTER.)

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Held, consequently, that such an action on contract *survives against the executors of the defendant.*

Rensselaer Circuit, June, 1857.

DEMURRER to complaint by the executors of E. Wiswall.

DANIEL GARDNER, *for plaintiff.*

I. The equity rule under the Code prevails as to parties, and all parties in interest within the state must be made parties plaintiffs or defendants. (22 *Barb.* 110, 111, 112 and 113; Code, §§ 69, 117, 118, 119 and 144; *Van Santvoord's Pleadings*, 2d ed., pages 149, 150, 154, 158, 161, 162, 165.) At page 161-2, Mr. V. says that § 118 of the Code "*will enable plaintiff to exhaust, in one suit, his remedy against a surviving partner, and the representatives of a deceased partner. And if this doctrine be true, so also, in case of the death of any joint contractor, whenever his estate would be liable in equity.*" *Ricart agt. Townsend*, (6 *How. P. R.* 460,) and 5 *Paige Ch.* 254, are to the same effect.

As this action rests on joint contract of Wiswall, Plum and Silliman with the state, and with the Doedt negligently drowned by them, by their servants and agents, and a joint legal liability arising therefrom, *no question of non-survivorship can arise from death of one joint contractor, and all are properly before the court, the executors representing the personal and property rights of Wiswall, deceased.* (See the above authorities, and *Campbell agt. Perkins*, 4 *Selden*, 435-6-7, 439, 440, *in point*; *Ferry Act*, 1 *R. S.*, 2d ed., t. p. 522—4th ed., 1056; 2 *Gray's Mass. R.* 348, 350; 10 *How. P. R.* 97, 102; 10 *Louisiana R.* 33; 6 *How. U. S. R.* 378; *Angell & Ames' Law of Carriers*, 2d ed., §§ 434, 439, and n. 1, 2; 2 *Salkeld R.* 440; *Law of Carriers*, Lond. ed. 1816, p. 36; 2 *Kernan*, 244; 3 *id.* 571, 573-4; 2 *R. S.* 2d ed. 50, 51, §§ 2-3; 3 *id.* 649, 781; 4 *Bacon Ab.* 138, 140.) On this ground no question of survivorship arises or can be raised by the executors of Wiswall.

II. The executors of Wiswall can raise no question of non-survivorship of the action arising from Wiswall's death, as the right of action was given to the family of Doedt, origin

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ally founded on a legal right of property in his life, and the contract with Doedt, and its violation being the basis of the legal obligation of duty. (*See Mr. Justice GOULD's opinion; Laws 1847, p. 575; do., 1849, p. 388; Safford agt. Drew, 3 Duer's R. 627; 3 R. S., 2d ed. 781; 2 id., 2d ed. 365, §§ 1-2.*) If the question of survivorship is to be considered, we say,

III. That the acts (*Session Laws 1847, p. 575, and 1849 p. 388,*) imposed a legal duty on Wiswall, Plum and Silliman to make compensation for the value of Doedt's life, and that the law implies a promise to pay it to the personal representatives of Doedt, plaintiff, and so the action survives, as all actions founded on contracts express or implied by law survive by and against the representatives of any party to the contract. (*See Mr. Justice GOULD's opinion in point, and 20 John. 43; Lalor's Sup. to Hill & Denio, 118, 119; 16 Wend. 25; 19 Wend. 239, 240, 242; 3 John. R. 183-4. See 2 R. S. 2d ed., 50, 51, §§ 2, 3; 3 id. 649, 781; 22 Barb. 404, 412, 413; 2 Kernan, 628; 13 How. U. S. R. 565, and 3 Kernan R. 80, 81, 82, as to rule of construction; 12 How. P. R. 224, 225; 23 Penn. St. R. 11 Har. 526, 528, 530; 16 Barb. 59, 60; 9 Cushing's Mass. R. 480; 28 Eng. L. and Eq. R. 48, 630; 3 Kernan, 80, 81, 82.*) Wiswall and his associates, as licensees of the ferry franchise, were legally bound to ferry Doedt safely, and they so contracted by legal implication with the state and with Doedt, and the negligent killing, violating the contract and passenger carrier's legal duty, the acts of 1847 and 1849, gave to the plaintiff, for the family, a right of action for compensation for the value of Doedt's life, and upon this legal duty the law raises an assumpsit in favor of plaintiff.

IV. The Revised Statutes killed the common law rule and enacted in its stead, *as to torts, §§ 1 and 2 in 2 Rev. St. 2d ed., 365, 396, 750, 781.* Hence, when the acts of 1847, p. 575, and of 1849, p. 388, passed, *making human life a family property*, all actions in behalf of the family survived as though express contract had been the basis of action, and 2 R. S. 50, 2d ed., § 2, gave survivorship to all contracts. This is a further conclusive ground of survivorship. (*9 Cushing's Mass.*

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R. 480, in point; *Lalor's Sup. to Hill & Denio*, 118, 119; 12 *How. P. R.* 224-5; 3 *Duer*, 627; *Missouri Rev. St.* 1835, §§ 24, 25, same as our §§ 1 and 2, 2 *Rev. St. 2d ed.* 365; 23 *Penn. St. R.*, 11 *Har.* 528, 530; 28 *Eng. L. and Eq. R.* 48; 18 *Missouri R.* 162-3-4; 9 *id.* 493-4-5, 496-7; 21 *id.* 115, 116, 117.) All injuries to "property," "rights," or "interests" of any one survive by our Revised Statutes, §§ 1, 2, 2 *Rev. Stat.*, p. 365. As the killing acts make human life a family property, and give it to certain persons, the action survives. (3 *Duer*, 627, and cases before cited on this point.) The principle that human life is a family property, to be paid for by those who wrongfully, negligently or by default, occasion its destruction, is an ancient rule of law. The Delphians threw the celebrated *Æsop*, an ambassador to the Delphian Oracle from an Asiatic prince, into the sea, probably for lampooning by a fable the oracular mysteries and deceptions of the pretended Oracle. After many misfortunes, this people sought to find his family and make payment for his life. The Romans adopted this rule as part of the civil law, and the German nations, France and Scotland incorporated this equitable doctrine into their jurisprudence. The Saxons carried it to England, and it was the law until the Norman Conquest, and then the King's Courts allowed it to fall into disuse. Our acts of 1847 and 1849 have restored this benign law. (23 *Penn. St. R.* 528, 530.) Many states have also adopted it, and it will soon become a settled principle of American jurisprudence.

V. As the acts of 1847 and 1849, and the general ferry act imposed a fixed legal duty on Wiswall, Plum and Silliman to make compensation to Doedt's family, and plaintiff had a legal right to recover \$5,000 as the value of his life, the action survives under the third section of 2 *R. S. 2d ed.*, p. 50, 51. (See above cases, and *Dayton's Surr. 2d ed.*, p. 290; *Angell & Ames on Cor.*, 2d ed., §§ 434, 435, and n. 1; *Lalor's Sup. to Hill & Denio*, 118, 119.)

VI. The action survives, as the legal basis of it is contract implied by law and an express contract with the state. (2

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Rev. St., 2d ed. 50, § 2, and 3 *Rev. St. Ap.* p. 649 and 781.) The section referred to gives survivorship to all actions of which contract is the basis. As to the correctness of this construction, see 22 *Barb.* 404, 412, 413; 2 *Kernan*, 628; 3 *How. U. S. R.* 565; 28 *Eng. L. and Eq. R.* 48. It is the plain meaning and obvious intent of the killing acts of 1847 and 1849, to kill the common law dead, dead in all cases within it; therefore individuals and corporations were put on the same basis. (9 *Cushing's R.* 480; 12 *How. P. R.* 224-5; 16 *Barb.* 59, 60; 23 *Penn. St. R.* 528, 530.)

VII. The common law rule, that personal actions die with the person, and to support which, on a former occasion cited various cases, ceased to be applicable to our law when the Revised Statutes went into effect, and his cases do not give our present law, and they must be disregarded. (See 4th, 5th and 6th points and authorities cited there.) All that remains of the old rule is found in 2 *R. S.* 365, § 2, which excepts purely personal torts for personal suffering and injury to the person himself or herself, where the action must be case, and not the right of action given to the family. (See 3 *Duer*, 627; 2 *Rev. St.* 2d ed. 50, 51, §§ 2, 3, p. 365, §§ 1, 2, and 3 *id.* 649, 750, 781. See *Mr. Justice GOULD's opinion.*)

VIII. In construing the power given by the license to Wiswall and his associates, he and they take nothing by implication. (11 *Pet.* § 345; 8 *How. U. S. R.* 581.) With this limitation, the intention of the makers of the statutes, the objects they had in view, and the mischiefs to be prevented, will govern the court in interpreting them, and the court will consider a thing within the spirit, though not within the letter of a statute, if these principles lead to that conclusion. (3 *How. U. S. R.* 565; 2 *Kernan*, 630-1; 5 *Selden*, 163, 451, 3-4; 2 *Gray's Mass. R.* 348, 350.) And where two interpretations are practicable, that "which best conforms to the terms, and the objects manifested in the enactment," by the above rule will prevail. (12 *Pet.* 72, 75-6, 83.) And in the latter case the Supreme Court of the United States held that where the words of a statute are general, "the court are not at liberty

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to insert restrictions." (*Id.*) It is also a settled rule of law, that a statute granting one or more persons to use a franchise, when accepted and acted on, the licensee or grantee is imperatively bound to the whole legal duty for the term, and in the manner prescribed in the statute. (2 *Gray's R.* 348, 350; 22 *Barb. R.* 412; 9 *How. U. S. R.* 259.)

Common sense and common justice, the law of all mankind, sustains our position, that this action survives.

Mr. Justice GOULD'S opinion, and the judgment given at special term, are in accordance with the ancient, universal and civil law, with the law of France and of Scotland, as well as that of Germany, and of many of our states, and accords with the real intent of our own statutes and improved law, and the judgment ought to be affirmed, with costs.

G. VAN SANTVOORD, for defendants.

I. The complaint contains no cause of action against the defendants, the executors, who demur. The actions are brought for causing the death of the plaintiff's intestate, by "wrongful act, neglect or default," under the act of 1847, as amended by act of 1849. They are actions "for injuries to the person of the plaintiff's" intestate, and do not survive. (2 *R. S.* (4th ed.) p. 690, §§ 1, 2; *Code*, § 121; *People* agt. *Gibbs*, 9 *Wend.* 29; *United States* agt. *Daniels*, 6 *How. U. S. R.* 11; *Hamby* agt. *Trott, Cowper*, 871; *Flynn* agt. *Hudson River R. R.*, 6 *How. Pr. R.* 308.)

1. The precise point has been adjudicated, both at special and general term, in actions brought by these plaintiffs against the defendant's testator in his lifetime, on a motion to substitute his executors as defendants, which motion was denied by Justice HARRIS, and unanimously affirmed by general term. (*See opinion of Judge HARRIS*, 14 *How.* 42.)

II. But the judge who overruled these demurrers makes a distinction between the two classes of cases, namely, that the former were for a *tort* on the face of the complaint, and the cases at bar are on *contract*. This distinction, we maintain, cannot be sustained. And even if it could, as a mere tech-

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nical distinction, still the actions, as at present stated in the complaint, are nevertheless actions "*for injuries to the person,*" within the meaning of the statute, and do not continue against the personal representatives.

1. The plaintiff's complaint states that the former suit was "*for the same cause of action.*" The learned judge, in his opinion, treats this allegation in a summary way, by assuming that the pleader does not mean what he says, but only that the suits were "*for the same occurrence.*"

2. Admitting such to be the meaning of the allegation, these suits are, nevertheless, for "*the same cause of action.*" The reasoning of the court below rests upon the basis that every legal liability incurred by a common carrier, for negligence, involves two different causes of action. This we conceive to be the radical fallacy which vitiates the entire argument of the learned judge who delivered this opinion, because,

3. There is not and never was any such thing as two different "*causes of action*" growing out of an entire or single act of negligence or default of a common carrier. Under the former practice, the plaintiff had two different *forms of actions*, one in form of contract, and one in form of *tort*. In theory, the latter was based upon the *wrongful* (or if the term be preferred, *criminal*) act, and the plea of not guilty was interposed as the defence. The former was based upon an *implied* contract, which was always required to be alleged in the declaration, but was a mere *fiction* which common law pleadings allowed, or at best, a mere legal inference or conclusion.

4. The confusion arises from endeavoring to maintain these distinctions when they have been forever obliterated and swept away by the Code. "*All the forms of pleading heretofore existing are abolished.*" (*Sec. 140, Code.*) There is, therefore, now not the slightest distinction, and cannot be, between setting forth against a carrier a cause of action for his direct negligence, and a cause of action for his dereliction of duty arising from his implied contract. It is exactly one and the same thing. "*Every action is now an action on the case.*" (*Minor agt. Terry, 6 How. 208; Field agt. Stone, 7 How. 12.*)

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5. Besides, it is of no sort of consequence (though the opinion assumes the contrary) that the word "contract" is used in the complaint. This was heretofore used to fix the *form* of the action, but did not and cannot now in any degree change the nature of the transaction which creates the liability. The *fiction* or *legal inference* of an implied contract cannot now be properly set forth in a pleading, but the *facts* from which the legal inference is drawn must be alleged. (*Eno* agt. *Woodworth*, 4 *Cms.* 249; *Glenny* agt. *Hitchings*, 4 *How.* 98.) Now, in this case, there are but a single set of facts, namely that defendants' testator was a carrier of passengers under license; that his servant received the plaintiff's intestate on board the ferry boat, and so negligently conducted it that plaintiff's testator was drowned. To go farther and set forth the *implied contract* to carry the passenger safely, growing out of the *duty* of a common carrier, is dealing not with facts, but with legal inferences, which the court alone must draw. There is, therefore, under the Code only *an action* against a common carrier, not an action in form on *contract*, or an action in form in *tort*, but *an action* resting upon one entire series of facts, from which but a single legal liability arises.

III. What then is the nature of these actions? Are they for injury to property, or to the person? Clearly the latter. And this of course must determine the question whether they continue against the personal representative or not. That they do not survive to the plaintiff's representatives or continue against the defendant's representatives, is clearly evident from the language of the statute itself.

"§ 2. The preceding sections shall not extend to actions for slander, for libel, or to actions for assault and battery, or false imprisonment, nor to actions on the case for injuries to the person of the plaintiff, or to the person of the testator or intestate, if an executor or administrator." (2 *Revised Statutes*, (4th ed.) p. 690.) And it is only by virtue of the acts of 1847 and 1849, that the representatives of the person injured can maintain an action against "the person who, or the corporation which would have been liable if death had not ensued,"

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(*Laws* 1847, p. 575.) And no right of action is given by these statutes against the personal representatives.

1. It will not seriously be contended that before these acts, an action on contract, or any other action, could have been maintained by the representatives of the party injured in these cases. The acts were passed expressly to give this new remedy; and creating as they do a new remedy, unknown to the common law, they must be *strictly construed*. (*Smith agt. Lockwood*, 13 *Barb.* 209.)

2. It seems to be assumed by the court below that because an action for the injury (had the party not died) might have been brought by him on the implied contract, *therefore* they survive by statute. This is clearly not so, because,

3. The statute excepts "*actions on the case for injuries to person*," &c. Now an action on the case might have been brought as well for the breach of a simple contract as for the commission of a wrong. The form of action in assumpsit against a common carrier for injuries to the person, referred to by the learned judge, (2 *Chit. Pl.* 362,) is an *action on the case*, as were all actions of assumpsit, "*trespass on the case on promises*." (2 *Chit. Pl.* 11.) But that very form indicates precisely the class of actions which do not by statute survive, viz: actions on the case (whether in assumpsit or *tort*) *for injuries to the person*.

4. Had the actions been against the carrier for injury to personal *property*, they might have survived by statute, whether framed in contract or *tort*. But there is no property mentioned or claimed in the complaint, or alleged to have been lost or injured—the only damage or injury being the death of the plaintiff's intestate.

IV. But it is said that the statutes of 1847 and 1849, creating this new remedy, make life a property, and therefore the action is not *for injury to the person*. And so it seems to be regarded in the opinion of the court overruling these demurrers. "A sort of statute life insurance against loss from specific risks," says the court. Such an artificial and overstrained construction will not stand the test of criticism; for,

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1. In the first place, if such a statutory life insurance had been intended, not as against the wrongdoer only, but against his personal representatives, would it not have been made to extend as well to the case of wilful, as of negligent killing? Can the statute be construed as a life insurance against the carrier's negligence, in case of his death, but not against his wrongfully causing the death of another person by violence or assault? The law would not tolerate such an anomaly. The one is no less an injury to the person than another.

2. The statute itself authorizes no such construction. The first section, and that alone, creates the liability, and it is for "damages," when death shall be caused by "wrongful act, neglect or default."

3. True, the damages are given by the second section to the widow and next of kin, and the jury are to regard the "pecuniary injury" to them resulting from such death, in estimating the damages. The statute was doubtless created for their benefit; but nevertheless the damages are such as result from "injury to the person." The section simply regulates the mode of distribution of the damages, excluding the creditors, and securing such damages to the widow, &c. It undertakes neither to create nor define any new right of property.

V. The complaint contains no more an action on contract than it does an action for tort; both are attempted to be joined, and the demurrer, for that cause, should be sustained.

VI. If the complaint be upon contract, as the court below assumes, then (the contract being of course joint) the complaint is fatally defective in joining the Wiswall executors with the surviving joint contractors. This ground is expressly stated in the demurrer, and it is not clearly perceived for what reason the court regarded the point as not before it. It was well settled before the Code, and has been repeatedly decided since, that surviving joint contractors alone should be sued, and the plaintiff has no right to unite with them the representatives of a deceased joint contractor. (*Higgins* agt. *Freeman*, 2 *Duer*, 650; *De Agreda* agt. *Wantel*, 1 *Abbott's Pr. R.* 130; *Morehouse*, *ex'r.* agt. *Ballou*, 16 *Barb.* 289, and cases cited by

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Judge HAND.) The order overruling demurrers should, therefore, be reversed.

GOULD, Justice. This action is *intended* for an action on contract, against the proprietors of a ferry franchise; the claim being meant for one that such ferry proprietors *agreed* for hire, to carry Charles Doedt, "safely," across the river, (including in "safely" the *care and skill* required for safe carriage;) and the breach of the contract consisted in stowing and managing the ferry boat, "with want of skill and care and with negligence," whereby the ferry boat was swamped, and Charles Doedt was drowned; ending with a claim, that his life was, to his estate, of the *pecuniary value* of \$5,000; and founding the right of action on the statutes of 1847 and 1849.

I have said the action is *intended* to be on contract; because the allegations of the cause of action are in *no form* whatever; and "a common understanding," (without *legal* information,) would be very much puzzled to give their meaning. Their lack of clearness and precision is carried to the very limit of what is sometimes said to be the effect, (as well as the intention,) of the Code, viz: that parties come into court and tell their own story, and the court is to apply the proper relief; (a state of things making the duties of the court anything but light or agreeable.) Still, as I am unable to see *any* reason for alleging a *contract*, unless the action were to be founded on it; and as a party has the absolute right to state just such a cause of action as he pleases, provided he states what *is* a cause of action, I consider this action (as laid) *sounding in contract*.

It thus varies entirely from the actions heretofore commenced by the same parties, against Ebenezer Wiswall, (now deceased,) in his lifetime. The complaints in those actions *professed to be for torts*—were so *on their face*;—and were without any shadow of a suggestion of the existence of any *contract* in the premises. So that, (granting the circumstances to be such as would allow a party to *waive the tort*, and *sue on the contract*,) in those causes the tort was *not* waived; but *it*, and not the contract, was sued on. Mr. Justice HARRIS decided,

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on a motion to revive those suits against Wiswall's executors, that the cause of action was for an *actual tort*, and did not survive; and denied the motion. On appeal to this court, at general term, that decision was unanimously affirmed; and in that affirmance I concurred. There was, however, no opinion given by the court; and so far as the opinion of that learned judge (as published) goes beyond the very point decided in those suits, the general term cannot be said to have given either decision or opinion. I therefore treat the case before me as one that has not been *directly* heard, or passed upon, at either a general or special term; giving to it the most careful consideration I can, and not doubting that a free expression of opinion is the surest way of attaining, (before an ultimate tribunal,) a satisfactory, as well as a final decision.

It thus becomes necessary for me to examine into the effect, (if there be any,) of this *change* in the allegation of the cause of action, and to see whether, as thus alleged, there *be* a cause of action. The determination of these two points will carry with it the remaining ground of the demurrer; which is that the action does *not survive against* the representatives of the *personal estate* of E. Wiswall, deceased. And it is well, in this connection, to note that executors, &c., (though called *personal* representatives,) represent not the *person*, but the *personal estate*. I treat as of no moment the plaintiff's averment that, in E. Wiswall's lifetime, she commenced against him "an action for the *same* cause of action," &c., as it plainly means "for the *same* occurrence;" without saying that the complaint, in that case, *stated the same ground for the suit* that is stated in this case.

To begin at the foundation of the claim, do the *facts* stated, constitute a *cause of action on contract*? At common law, the general rule certainly is, that where the cause of action is a *tort*, or arises *ex delicto*, and *must be declared upon as a tort*, the executor is *not* liable. And the *reason* therefor is two fold: 1st. The testator's *property* (which the executor represents) was not *augmented* by the wrong, (meaning not merely by the *tortious act itself*, but by the *transaction, in the course of which the tortious*

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act was done ;) and 2d, the *plea* must be *not guilty* ; so, on the face of the record the charge is of a private criminal injury or wrong ; and such, as well as public crimes, are buried with the offender ; and the law will not allow the trial of an issue as to the *guilt* of a deceased person. (*Toller's Executors*, 361-2, 460 ; *Cowper*, 375.)

But, at common law, where the *estate* of the party doing or omitting the *act* complained of, was increased *by the transaction, during which the default or neglect occurred*, (as where the transaction was *in the line of his business, from which he received a profit to his estate*,) the representative of *that estate*—the executor—was always held liable to the party injured, in an action *on contract*, whether there were, *in fact*, an express contract, or only the *implied contract* which the *law* supplies where the facts warrant it. Thus Sir THOMAS RAYMOND, (*p.* 71, 72,) in a case held *not* to lie, (*because it was in form tort, and the plea not guilty*,) cites *Savill's Rep.* 40 ; which case is cited and approved in *Cowper*, 376, thus : MANWOOD, Justice, said, "in every case where any price or value, is set upon the thing in which the offence is committed, if the defendant dies, his executor shall be chargeable ; but where the action is for damages only, in satisfaction of the injury done, then his executor shall not be liable." That was a suit for cutting down and carrying away trees by testator, and the executor was held liable for the value of the trees, not for damages for the trespass. The very case in *Cowper*, (*Hambly agt. Trott, p.* 371, &c.,)—which is considered by the defendants as embodying the whole strength of the law in their favor—was in form, trover, and the plea not guilty. And though there it was held, that the executor was not liable, yet (*at p.* 377) Lord MANSFIELD gives the unanimous opinion of the court thus : "The form of the plea is decisive, viz : the testator was not guilty ; and the issue is to try the guilt of the testator. And no mischief is done," (by deciding that suit against the plaintiffs,) "for so far as the cause of action does not arise *ex delicto* or *ex maleficio* of the testator, but is founded on a duty which the testator owes the plaintiff upon principles of civil obligation, another form of ac-

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tion may be brought, as an action for money had and received," (which is on a contract implied by law, from the duty or obligation, and not on an express contract.) He thus says, expressly, that though the facts showed an actual tort, the party injured, (in a case where there was arising out of the same facts, a legal duty, from which the law implied a contract,) might waive the tort, and sue on the contract, and the executor would then be liable.

These principles go further than the case of negligence in a common carrier, for they imply a contract out of a mere duty; whereas, it has always been held, that a common carrier, by receiving goods or persons to carry for hire, necessarily agrees to carry, &c., with proper care and skill. There is a very well considered case in (2 *New Rep.* 395, &c., *Powell* agt. *Layton*), where the declaration was for loss of goods by negligence, with no word in the pleading of any contract, and the defendant pleaded in abatement, the non-joinder of his two partners in the carrying trade; and (though pleas in abatement are never favored) the plea was sustained, the court holding that the action was founded on contract, and of necessity, that the negligence was merely introduced to show the breach of the contract. (See 2 *New Rep.* 367 to 373, and also 5 *Esp. Cas.* 32, *Day's edition*, note 1, third paragraph.)

That this ground of liability extends to injuries to the person of a passenger, see an express decision in an action of assumpsit for such injuries, (2 *Campb.* 79 to 81,) where it is said by Sir J. MANSFIELD, Ch. J., that the carrier "did not warrant the safety of the passengers. His undertaking as to them, went no further than this; that as far as human care and foresight could go, he would provide for their safe conveyance." And (*Chitty's Pleadings*, 2d vol. p. 362,) gives the proper form for declaring in assumpsit, for such injuries.

But common law decisions will be found to come still nearer to the case before us. (*Chitty's Pleadings*, vol. 1, p. 102,) says, "an action of assumpsit may be maintained against the executor of an attorney for unskilfulness or carelessness in the conduct of a cause, or other professional business in which the

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testator was employed." And for this, he cites the very case decided (in a suit for pecuniary loss caused by the attorney's negligence,) in 3 *Starkie Rep.* 154; *S. C.*, 3 *Eng. Com. L. Rep.* 684.

Before attempting to apply that decision to this case, it is necessary to inquire how far the circumstance of the killing affects the position of the parties; and this involves the consideration of the statutes of 1847 and 1849. (*Laws* 1847, 575, 576; *Laws* 1849, 388, 389.) For greater accuracy, I quote: "Whenever the death of a person shall be caused by wrongful act, neglect or default, and the act, neglect or default is such as would, (if death had not ensued,) have entitled the party injured to maintain an action, and recover damages in respect thereof, then the person, &c., who would have been liable, if death had not ensued, shall be liable to an action for damages notwithstanding the death." And by the second section, this action is given to the personal representatives of the deceased person, the amount recovered to be distributed to the next of kin; and this section adds, "the jury may give such damages as they shall deem fair and just, with reference to the pecuniary injury resulting from such death to the next of kin."

It should further be observed, that the first section gives the action, "although the death shall have been caused under such circumstances as amount, in law, to felony." Thus showing the intention to compensate the next of kin, (through the representative of the personal estate,) for the pecuniary loss, whether the killing act be a crime or a chance; a wilful and forcible attack, or an act positively careless; or a mere neglect to use such care and skill as (in the circumstances of a particular case,) the law says it is the duty of the party to use.

I would also observe on this first section, that while it uses the words, (that if the manner or nature of the injury be such that the party injured, if not killed, could maintain,) "an action and recover damages in respect thereof;" the subsequent words constitute a positive enactment, making the actor liable to "an action for damages," (not to the person who was personally injured, but) to some one else. Now the phrase "an

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action and recover damages in respect thereof," gives no intimation as to what shall be the legally stated "cause of action;" and the party injured, (if not killed,) as truly "recovers damages in respect thereof," when (in a case legally proper,) he waives the tort and sues on the contract, as when his suit is technically for the tort. Besides, even were the act, &c., such that the party injured (if not killed,) would be compelled to found his complaint on tort, the section in giving "an action for damages," (to some one else,) does not, in terms, or necessarily, give to that some one else the action—the same action—(either in form or ground therefor, as the second section proves,) which the living, injured party would have had; but "an action,"—any action to which the rules of the law, as applied to the facts, entitle the party suing. And, as just noted, the second section proves this to be the true construction of the first; for it explains the word "damages," to mean just what it does in an action on a note, (a pecuniary compensation, and not what is understood by "damages," in an action for assault and battery,) and says the damages are to be such as are fair, "with reference to the pecuniary injury resulting from such death;" and, not stopping there, it adds, it must be for such pecuniary injury, "to the next of kin," (the takers of the personal estate, who assuredly have suffered no personal wrong, have sustained no violence, felt no assault and battery.) The section puts no estimate on, gives no place for any element of wilfulness, any circumstances of outrage, any degree of suffering, any matter of mere aggravation. It is thus within the very scope of *Cowper*, 372: "An action founded merely on an injury done to the person, where no property is in question, dies with the person, as in assault and battery, and the like. But where property is concerned, the action remains, notwithstanding the death," of the party liable. For, however unpleasantly it may strike us, these statutes have created (in the next of kin) a property interest in the death of the person killed, accruing like dower, at and by the death; the value of which, and no more, (as in *assumpsit* on the *quantum valebat*.) is the rule of "damages." It is, in effect, a sort of statute life

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insurance against loss from specified risks ; the interest in the amount assured, accruing and becoming vested, by the fact of the death, in the party to whom it is payable. I can hardly conceive a closer application of the principle of the oldest reported case, as cited from Justice MANWOOD, above. By force of the statute, a "price or value is set upon the thing in which the offence is committed." And here may also be applied Lord MANSFIELD's remark, (*Cowper*, 377,) that "so far as the action is founded in a duty which the testator owes the plaintiff," (the obligation to pay the pecuniary loss he has caused, not to the party killed, but to the plaintiff or those she represents,) "upon principles of civil obligation another form of action may be brought," which would survive against the executor of the party liable.

As a common carrier of passengers then, on the principles, and by the cases above cited, Ebenezer Wiswall, deceased, was, in the circumstances of this case, liable to a party injured (and not killed) in an action on contract ; and that action would survive against his executors. By the statutes cited, an action for the same occurrence being given to the executors of the party killed, they, were the statutes silent on the point, must be at liberty to allege the same cause of action that the party injured (if not killed) could have alleged ; the death certainly not changing the cause of action from contract to tort. But were this doubtful, or even ruled to the contrary, the second section, by defining the claim of the executor to be founded on the loss of property, brings the case clearly within the rules allowing a waiver of the tort, and a suit on the contract.

To this view of the case I conceive the statute, cited by both parties, (*2 Rev. St. 2d part, 8th chap. 3d title, 2d section,*) can have no application. The person killed is not the plaintiff. The action itself never did and never could belong to the party killed. It is a statute right of property, for which the statute gives an action ; and the whole matter was utterly unknown, it had no existence, when this section of the Revised Statutes was passed, twenty years before that of 1849. But had it been in existence, I do not see how the words "nor to actions on

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the case for injuries to the person," can have any other fair construction than this—actions, which being on the case, (a technical phrase,) are for a tort, and require the plea of not guilty; certainly not touching an action on contract, or one for pecuniary loss.

I hold this action to be properly on contract, and to survive against Ebenezer Wiswall's executors.

The question as to the propriety of joining with them the surviving partners of Ebenezer Wiswall, is not now before me. Therefore, without any intimation on that point, judgment is ordered for plaintiff on the demurrer, with leave to the defendants demurring, to answer in thirty days, on paying costs, to be adjusted by the clerk.

Albany General Term, September, 1857.

IRA HARRIS, GEO. GOULD, DEODATUS WRIGHT, *Justices.*

This decision affirmed. D. WRIGHT, giving the opinion. HARRIS, J., dissenting.

SUPREME COURT.

DANIEL RAMSON agt. THE MAYOR, &c., OF NEW-YORK.

The amended charter of the city of New-York, of 1849, (§ 18,) organizes an executive department to be known as the "law department," "which shall have charge of and conduct all the law business of the corporation, and of the departments thereof, and all other law business in which the city shall be interested, when so ordered by the corporation."

The intent of the charter was, to place all legal business in the control and under the management of the *corporation counsel*, in the result of which the corporation might have *any interest*, and for the expense of which it might, by any possibility, be called on for payment.

Thus the corporation counsel has confided to him, and it is made his duty to conduct, as well all the law business of the legislative department, or either branch of it, as to conduct the law business of the several executive departments, and their several bureaus and subdivisions.

It is not competent, therefore, for the executive or legislative department, or any

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of its committees or agents, to pass by the law officer selected by the people, and charged by the charter with these duties, and select and appoint other counsel to perform them. Where there is such appointment made, the counsel has no right of action, or redress for his professional services against the common council.

It seems, also, that the act of employment of counsel by a committee of the legislative department, is an *executive* act which they are incompetent to perform.

Trial by the court, New-York Circuit, April, 1857.

In 1855, the board of aldermen of this city resolved to institute an investigation into the affairs of the police department, and appointed a committee to conduct the investigation. During its progress, several witnesses declined answering questions put to them by the committee, and the committee instituted legal proceedings to compel them to answer. The counsel to the corporation was not employed or applied to, to conduct the proceedings; but the special committee employed such counsel as were agreeable to them for that purpose; among others, the assignor of the plaintiff.

There was no inability on the part of the counsel to the corporation to act in the premises; and he testifies that he should have acted if he had been applied to for that purpose.

The bill of the plaintiff's assignor, for professional services rendered to the committee, amounts to \$681, and to recover which this suit is brought.

A. NASH and WM. CURTIS NOYES, *for plaintiff.*

M. V. B. WILCOXSON, *for defendants.*

DAVIES, Justice. No question is made in this cause as to the rendition of the services of the plaintiff's assignor, or the reasonableness of the charges therefor. The simple question presented is, can the corporation be made liable for this claim?

Section 18 of the charter of 1849, organizes an executive department, to be known as the "law department," "which shall have charge of and conduct all the law business of the corporation and of the departments thereof, and all other law

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business in which the city shall be interested, when so ordered by the corporation."

By the city charter, therefore, the counsel to the corporation is "to have charge of, and conduct," not only all the law business of the corporation, but all the law business of the several departments of the corporation. These provisions apply to all cases in which the corporation, or any of its departments, have any law business to be transacted. In addition to this, the counsel is to have charge of and conduct "all other law business in which the city shall be interested, when so ordered by the corporation." The application of this latter provision, and the reason for its enactment, are familiar to all who have had any practical knowledge of the affairs of the city government. Many suits, proceedings and causes, are constantly instituted, in which neither the corporation nor any of its departments are parties. But the questions to be decided may be such as to affect the property or rights of the corporation, or some of its officers. Previous to the charter of 1849, such suits were defended or prosecuted by counsel employed by the immediate parties to the action, and frequent calls were made upon the city treasury for their payment, on the ground that the corporation was interested in the suit or in its result. The intent of the charter of 1849, was to place all legal business, in the control and under the management of the corporation counsel, in the result of which the corporation might have any interest, and for the expense of which it might, by any possibility, be called on for payment. It was in reference to this class of cases, that the counsel to the corporation was to take charge of and conduct, whenever required so to do by the corporation, all law business in which it had any interest. It is quite manifest, that it was the intention of the framers of the charter and the ordinances, that all the law business of the corporation, or of its departments, or in which the corporation should deem it had any interest, should be conducted by, and should be placed in the charge of the counsel to the corporation. For these services, a specific salary is given to that

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officer, such as was deemed an adequate and reasonable compensation therefor. These services he is bound to render; and must do it for the compensation allowed. It is in the power of the common council to alter and graduate this compensation, from time to time, in reference to the services rendered; but I can find no authority for it to withdraw, and place in other hands, duties which the charter has confided to him, and which he, by his oath of office, and every obligation resting upon a public officer, is bound to discharge.

The counsel is not only required to take charge of, and conduct all the law business of the corporation, but all the law business of the several departments thereof. The powers of the corporation of this city are divided into legislative and executive. The legislative powers are vested in a board of aldermen and board of councilmen, who, together, form the common council of this city. These two bodies, therefore, form the legislative department of the city government, and are as much subject to the provisions of the charter as the executive department. The powers of the latter are vested in the mayor, and the heads of the several departments created by that charter, and each moves in its allotted sphere, subject to the restraints of their common constitutional superior, the charter of the city. It is, therefore, quite apparent that the counsel to the corporation has confided to him, and it is made his duty to conduct, as well all the law business of the legislative department of the corporation, or either branch of it, as to conduct the law business of the several executive departments, and their several bureaus and subdivisions. And it is not easy to see how it is competent for the legislative department, or any of its committees or agents, to pass by the law officer selected by the people, and charged by the charter with these duties, and select and appoint other counsel. If it can be done, it may be equally competent for each of the executive departments, and their several subordinates, to do the same thing.

This certainly would present an anomalous state of affairs. Each department might thus have its own law officer, subjecting the city treasury to enormous drains, while the legally

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and duly selected law officer of the city, to whom is given a salary for the discharge of these duties, who has an office and clerks provided for at the public expense, to enable him the more readily to discharge them, may be sitting idly in his office, and receiving this compensation, without rendering any equivalent. I am quite sure that no such state of things can be allowed under the charter, or that there can be any serious doubts that it cannot be permitted.

If the duties of counsel prescribed by charter can be taken away from him, and confided to others by the common council, or either board, or by any committee thereof, why may not the same thing be done as to those of the mayor, comptroller, or any head of any other department? The simple statement of the proposition carries with it its refutation. If it, however, can be done in the one case, it certainly can in the other.

Section 19 of the charter of 1849, authorizes the common council to establish such other departments and bureaus as they may deem the public may require, and to assign to them and those therein created, such duties as they may direct, *not inconsistent with that act.*

This provision is a clear legislative restriction on the powers of the common council to withdraw any duties confided by the charter to any particular department or bureau, and devolve the same upon any other department or bureau then existing or thereafter to be created.

So long as these plain and unmistakable provisions of the charter continue in force, I can have no doubt that they must be conformed to.

If there could be any doubt of the power of the common council to take upon themselves duties devolved on the departments, it was removed by the decision of this court in the case of *Christopher agt. The Mayor, &c.*, (13 Barb. 567.) In that case, the board of aldermen assumed to direct the commissioner of repairs and supplies with whom he should make a contract for the rebuilding of Washington Market.

This court held, that a contract not made by the commissioner in pursuance of the charter and ordinances of the city,

would be invalid, and granted an injunction restraining the action of the common council. I am, therefore, constrained to say, that the action of the committee, in the present case, was in direct conflict with the charter, and without authority, and consequently void, and that their employment of the plaintiff's assignor, however meritorious the services he may have rendered, or reasonable the charges made, created no legal liability upon the defendants, and there can be no recovery against them therefor.

Another objection to such right of recovery, even if I am wrong in these views, exists, and which, I fear, is insurmountable; that is, that the act of employment of counsel by this committee is an executive act, which they were incompetent to perform.

It must be quite within the recollection of those who have interested themselves in the affairs of the city government, that prior to 1830, it was deemed a great evil, and one pregnant with most mischievous consequences, for the common council, or its committees, to exercise any executive functions.

That charter provided, that the legislative power of the corporation should devolve upon the board of aldermen and assistants, and that those two boards should together form the common council.

The 21st section of that charter declared, that the executive business of the corporation should thereafter be performed by distinct departments, and which it was made the duty of the common council to organize and appoint for that purpose.

These provisions would seem to have been so clear and specific, that their meaning could not have been misunderstood. Notwithstanding this express declaration of the legislature, that thereafter the executive business of the corporation should be performed by distinct departments, and the common council were enjoined to organize those departments, the common council still continued to perform executive duties, and neglected to organize the departments. This state of things induced the action of the legislature in 1849, when an amended charter was passed. By it, the executive departments were

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organized, the duties of each defined ; and section nine thereof declared, that thereafter " neither the common council, nor any committee or member thereof, should perform any executive business whatever." This inhibition is plain and specific, and would seem sufficiently certain to remove all doubts of its meaning and intent.

It was well observed, in the case of *Christopher (supra)*, that there may undoubtedly be some acts which do not come exclusively within either division of the powers of government, and which may, without violence to language, be classed under either head. But the common council have themselves given a practical construction to the meaning of this section, by the passage of an ordinance, permitting the counsel to the corporation to select such additional professional aid as he may deem requisite in the discharge of the duties of his office, with the consent of the mayor and comptroller. Now the plaintiff's assignor was not thus selected, but appointed to this duty by the special committee of the board of aldermen. I think it was one of the main objects of the legislature, in passing this charter, to divest the common council, its committees and members, of all patronage and business, other than legislative, with the exceptions contained in the charter ; and that no contract like the one now under consideration, or employment, can create any legal liability upon the defendants. One of the executive acts condemned by this court in the case of *Christopher (supra)*, was the employment by the committee of the board of aldermen, of an architect to prepare the plans and drawings for the rebuilding of the Washington Market.

Peterson, the architect thus employed, commenced a suit against the corporation, to recover compensation for the services thus rendered, in the New-York common pleas. That court held, that the employment by the committee of the board, did not create a valid contract, which was binding on the defendants, and gave judgment accordingly. I agree with the remark of the presiding judge of that court, in that case, that it, like the one now under consideration, appears to be a hard case for the plaintiff, and that it would be equitable that

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he should be compensated for the services which he has rendered; but the obstacles in the way of a recovery in an action against the defendants for such services, appear to me insurmountable.

Judgment for defendants.

SUPREME COURT.

The People *ex rel.* SAMUEL GRAHAM *agt.* DANIEL L. NORTHROP, Auditor of the City of Brooklyn.

The common council of the city of Brooklyn, on the 11th of April, 1855, adopted the following resolution:

"Resolved, that the sum of 500 dollars per year, commencing on the first day of January last, be appropriated to the commissioner of repairs and supplies, for the payment of the expenses of keeping a horse and wagon, which is required to enable him to discharge his duties, and the comptroller is hereby directed to pay the same in monthly payments, upon the certificate of the auditor."

The relator, Samuel Graham, was duly elected commissioner of repairs and supplies, and took his office on the 1st January, 1857, and on the 2d of March, 1857, presented to the auditor for his official certificate, the bills for the preceding months of January and February, each for one twelfth part of 500 dollars, for payment of expenses in keeping a horse and wagon in the performance of his official duties as such commissioner.

The auditor refused to certify the bills, on the ground that the resolution awarded to the commissioner only his *actual expenses* in keeping a horse and wagon, and that the bills presented contained no statement of such expenses, nor any evidence that the sums claimed had been expended.

Held, that the auditor was wrong. The resolution appropriates the entire sum of \$500 in gross; not (as the auditor supposed,) so much of it only as would be necessary to defray the actual expenses, not exceeding that amount. Besides, the auditor claimed to exercise a discretionary power, when he had none.

Mandamus granted.

Brooklyn General Term, July, 1857.

Before S. B. STRONG, BIRDSEYE and EMOTT, *Justices.*

APPEAL from an order at special term denying an application of the relator for a peremptory mandamus.

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JOHN M. VAN COTT, *for relator.*NATHANIEL F. WARING, *for defendants.*

By the court—S. B. STRONG, Justice. On the 11th of April, 1855, the common council of the city of Brooklyn adopted the following resolution :

“Resolved, That the sum of 500 dollars per year, commencing on the first day of January last, be appropriated to the commissioner of repairs and supplies for the payment of the expenses of keeping a horse and wagon, which is required to enable him to discharge his duties, and the comptroller is hereby directed to pay the same in monthly payments upon the certificate of the auditor.”

The relator was elected commissioner of repairs and supplies, of that city, in November, 1856, for a term commencing on the first day of January, 1857. On the last-mentioned day, he entered upon, and has since continued in the discharge of the duties of the office. He has, during all that time, kept a horse and wagon, which he has devoted to the performance of his official duty. On the 2d of March, 1857, he presented to the auditor for his official certificate, the bills for the preceding months of January and February, each for the one twelfth part of 500 dollars, appropriated to the commissioner for the payment of the expenses of keeping a horse and wagon in the performance of his duties.

The auditor refused to certify the bills, on the alleged ground that the resolution awarded to the commissioner only his actual expenses in keeping a horse and wagon, and that the bills presented contained no statement of such expenses, nor any evidence that the sums claimed had been expended. An alternative mandamus having been issued, and a return made showing these facts, the relator applied at a special term, held in the county of Kings, for a peremptory mandamus requiring the defendant to certify his bills. The motion for a peremptory mandamus was denied, and the relator thereupon appealed to this court at the general term.

The sole question for our consideration is, whether the rela-

tor is entitled under the resolution to a sum in gross, or only to his actual expenses, in keeping the horse and wagon, not exceeding that amount? In terms, and I think in substance, the resolution appropriates the entire amount, not so much of it only as would be necessary to defray the actual expenses. The direction to the comptroller to pay the *same*, undoubtedly refers to the entire sum of 500 dollars. True, the word expenses is the last antecedent, but the requisition could not have referred to them, as they were not to be fully paid at all events, nothing over the specified amount. This construction is strengthened by the retrocession of the allowance for the antecedent three months before the adoption of the resolution. As no particular account of the actual expenses during that time had probably been kept, none could have been made out, and none could have been designedly required. Besides, the direction to make monthly payments is usual when there is a fixed compensation, but is seldom, if ever, given where the amounts depend upon contingencies, and may, and probably will, vary. If the amounts of such monthly payments should be according to the actual expenditures, and there should be a change in the incumbent during the year, injustice might be done to the newly appointed officer when the antecedent expenses had exceeded the average. The same practical construction has been given to the act allowing the payment of the expenses of the justices of this court residing out of New-York, while holding courts in that city. (*Ch. 374 of the acts of 1852.*) The 6th section of that act authorizes the supervisors to pay to such justices such sum for expenses *incurred* thereby as may be proper and necessary. The board of supervisors subsequently adopted a resolution to pay the justices a specified sum for each day. I understand (for I have not myself had any experience on the subject) that the justices who have received anything from the critical comptroller of that city, have claimed and been allowed the specified amount, without reference to their actual expenditures. Those learned judges must have given a similar construction to a provision of the law strongly resembling

the resolution which I am considering, and their opinion is entitled to much consideration.

The learned judge who decided this case at the special term, thinks that the requisition that the payment must be made upon the certificate of the auditor, implies that he is to pass upon the items or particulars of an account which must be of actual expenses. He refers to the sections of the ordinance relative to the duties of the city officers, which requires the auditor to make entries in his books, showing the date and items of each claim, and to examine such items. As the duty was imposed by an ordinance of the common council, it was competent for the same body to modify or dispense with it in any particular instance. If, therefore, the resolution in question had required any official act, essentially variant from the general ordinance, that would not have rendered such resolution nugatory. But it did not require any essential change from the ordinary duties of the auditor in this respect. He can still make the requisite entry in his official books, showing the date and only item in each monthly account, and he can and should examine the item to see that it corresponds with the allowance specified in the resolution. He can also, I think, require evidence that the commissioner has kept a horse and wagon, and employed it in the public service during the time for which the charge is made. And then he will have done all which the city ordinances require of him, antecedently to his signing the usual certificate. It cannot be supposed that the common council ever designed to authorize this, its inferior officer, to vary the rate of compensation fixed by its own resolution. If the rate should not be fixed directly by the common council, it might be, and frequently (if not usually) is, by a contract made upon an advertisement for bidders or proposals. In such cases contractors are often paid (to use a familiar phrase) by the job. When their claims, in such cases, are presented to the auditor, all that he has to do is to ascertain that the work has been properly performed. He could not be expected to, nor could he be legally required to inquire and determine whether the rate of compensation

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was exorbitant or reasonable. It seems to me, therefore, that the mere fact that a certificate from the auditor is required as preliminary to the payment of an account, does not necessarily raise an inference that there must be items of actual expense, rather than a fixed sum which can be neither exceeded nor diminished.

The requisite facts to establish these accounts were admitted. The auditor placed his refusal to certify the bills on untenable grounds, and claimed a discretionary power when he had none. It is, therefore, a proper case for a mandamus.

The judgment at the special term must be reversed, and there must be a peremptory mandamus, but without costs.

SUPREME COURT.

THOMAS FISHER agt. WILLIAM HUNTER.

In the taxation of costs, the general principle is, that a party who recovers costs is entitled to have the amount fixed according to the fee bill in force at the time of the recovery. Therefore, an action decided in June, 1857, when the party became entitled to costs, properly came within the amendments of the Code as to costs, which became operative in May, 1857.

By the 8th subdivision of § 307 of the Code, (amended in April, 1857, and stands as sub. 7,) it is provided that a fee of \$10, shall be allowed to the prevailing party for every circuit or term at which the cause is necessarily upon the calendar, and is "*not reached or postponed*." These words, "not reached or postponed," have been regarded as very much of a puzzle. The grammatical construction undoubtedly is, *neither reached nor postponed*. But the practical construction to be given to these words should be that the successful party is entitled to this fee for attending the circuit prepared for trial, when without his own default, he had failed in trying his cause, as was held in *Sipperly agt. Warner*, (9 How. 333,) and *Shufelt agt. Power*, (13 id. 89.) That is, it might happen that the cause would not be reached; then the party finally successful should have his fee. It might happen that being reached, he could not try it. The court might refuse to try it. The parties might, for their mutual convenience, agree to postpone or refer it. If so, if the cause is *postponed* in either form, and the costs of the circuit or term are not otherwise provided for by the terms of postponement, the calendar fee is allowable.

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Albany Special Term, June, 1857.

MOTION for retaxation of costs.

THE action being at issue, was upon the calendar for trial, at the Albany circuit, in November, 1856. After the commencement of the circuit, and before the cause was reached upon the calendar, it was referred by consent of the attorneys for the parties respectively. The trial before the referee commenced before the amendments to the Code adopted in 1857, took effect. The referee made his report in favor of the defendant, on the 8th day of June. Upon the taxation of the costs, the taxing officer allowed the defendant \$10, for a calendar fee at the November circuit, when the cause was referred, and allowed for services at the increased rates prescribed by the amendments of 1857. These allowances were objected to, and the objections having been overruled, the plaintiff moved for a retaxation.

ISAAC LAWSON, *for plaintiff.*

LAYFAYETTE D. HOLSTEIN, *for defendant.*

HARRIS, Justice. The general principle applicable to questions like this, is, that a party who recovers costs, is entitled to have the amount of such costs fixed according to the fee bill in force at the time of the recovery. The amendments of the Code adopted by the legislature of 1857, became operative in May. This action was decided in June. It was then that the defendant first became entitled to costs. The new fee bill was then in force, and the clerk properly taxed the costs, according to the rates prescribed by the last amendment.

The effect to be given to the words "not reached or postponed," in the 8th subdivision of the 307th section of the Code, has been regarded as very much of a *puzzle* ever since the Code was adopted. When it is said that a fee of ten dollars, shall be allowed to the prevailing party for every circuit or term at which a cause, though upon the calendar, is *not reached*, the meaning is sufficiently obvious. The difficulty is, to determine what was intended, when the legislature added the

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words, "*or postponed*," or as it stood before the amendment of 1852, "*or is postponed*." The plaintiff's counsel supposes that the fee is only allowable in cases where the cause is *neither reached nor postponed*. He insists that if a cause, though not reached, is put over the circuit, the fee is not taxable. This is, perhaps, the grammatical construction of the language, as it now stands. But I think the better and more practical construction to be given to these terms is that adopted in *Sipperly agt. Warner*, (9 *How.* 333;) and *Shufelt agt. Power*, (13 *How.* 89.) I think it was intended to give the successful party this fee, for attending the circuit prepared for trial, when without his own default, he had failed in trying his cause. It might happen that the cause would not be reached. Then the party finally successful should have the fee. It might happen that being reached, he could not try it. The court might refuse to try it. The parties might for their mutual convenience agree to postpone it. If so, if the cause is *postponed* and the costs of the circuit or term are not otherwise provided for by the terms of postponement, I think the calendar fee of \$10 is allowable to the prevailing party.

In this case, the parties attended the circuit for trial. For their mutual convenience, and by mutual consent, it was *postponed* by the agreement to refer. The prevailing party upon the trial, thereby became entitled to the costs of that circuit, including the fee allowed by the 8th subdivision of the 307th section. The motion must, therefore, be denied, but without costs.

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SUPREME COURT.

The People *ex rel.* JOHN WILDEY, JUN. agt. ANDREW V. STOUT, County Treasurer.

The laws of 1853, (*Session Laws of 1853, ch. 610*,) totally repeals the act of 1847, so far as it affects the register of the city and county of New-York, thereby abrogating the salary of that officer, and payment of fees to the county treasurer, and reinstating the office to its former condition, prior to 1847, by the receipt of fees as a compensation to the register, and for the expenses of his office.

Held, therefore, that the amount of compensation claimed by an engrossing clerk in that office, during the year 1854, was not a legal claim against the city or county, although audited and allowed by the board of supervisors. His only claim was against the register who employed him.

New-York Special Term, March, 1857.

AN order to show cause why a peremptory mandamus should not issue, was granted in this case, on the 16th of March, 1857, from which it appears that the relator was employed as an engrossing clerk in the office of the register of the city and county of New-York, during the year 1854. His bill for his services amounting to \$339.75, was not paid by the register, and he applied to the board of supervisors to pay it. It was audited and allowed by the supervisors, and upon presentation of the bill to the county treasurer, he declined paying it, and for cause now states, that the claim is not a county charge and was improperly allowed as such by the supervisors.

WILLIAM R. STAFFORD, *for relator.*

M. V. B. WILCOXSON, *for the county treasurer.*

DAVIES, Justice. Previous to the act of 1847, (*L. 1847, ch. 482*,) the register took to his own use all the fees of his office, and paid all the expenses thereof; the act of 1847 substituted for his compensation a salary of \$2,500, and directed that all fees received should be paid into the city treasury. Section 16 of this act directs the comptroller to pay the expenses of

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his office from the fees thus received, and that no greater sum shall be paid in any one year than shall be received into the treasury on account of fees, &c., accruing at such office during such year. It is thus quite apparent, that it was not intended by the legislature that this office was in any way to become a charge upon the treasury.

By sec. 4 of chap. 610, Laws of 1853, it is declared, that so much of chap. 132, Laws of 1847, as relates to said register, is thereby repealed. The office of register was thereby reinstated in its former condition prior to the act of 1847, and it was no longer incumbent on the register to account and pay over to the city his fees, nor had the city thereafter any fund, or was it under any obligation to pay the expenses of the office. No doubt could be entertained on this point, but for the provision of the latter part of section 3 of the act of 1853. It most unmeaningly declares, that the searchers and copyists are to be paid out of the fees paid into the city treasury, pursuant to chap. 432 of the Laws of 1847; and yet the next section repeals all of that law, so far as it relates to the office of register. This repeal, therefore, destroys any such fund, and after its enactment there were no fees to be paid into the city treasury pursuant to the act of 1847. It is absurd, therefore, to say, that any such fund existed after such repeal, and this last section must be taken as inconsistent with the provisions of section 3, and as controlling them; in effect, it repeals this part of sec. 3, and it is clear to my mind, that the framer of it did not contemplate a total repeal of the act of 1847, so far as it relates to the register, while penning this section. But the succeeding section totally repeals the act of 1847, so far as it affects the register, and being repugnant and inconsistent with what precedes it in section 3, that must be held to be abrogated by it. In my judgment, the relator's only claim is against the register who employed him, and for whom he worked—that he has no legal claim for his services against the city or county, and that the motion for a mandamus must be denied.

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SUPREME COURT.

BENJAMIN H. MACE and others agt. THE TRUSTEES OF THE
VILLAGE OF NEWBURGH.

A court of equity will not assume jurisdiction to review the legality or validity of proceedings of a municipal corporation in prosecuting a local improvement, or in assessing or collecting the means to complete it.

This court has no supervisory power over such proceedings of public officers, or jurisdiction, and ought not to interpose by injunction to restrain their action, merely upon an allegation that their proceedings are *illegal or invalid*. The common law writ of *certiorari*, is the proper remedy in such cases.

To authorize a court of equity to interfere by injunction in such cases, it must appear that the acts of the corporation which are done or threatened, in the prosecution of the work, or the like, will be productive of peculiar or irreparable injury to the premises of the plaintiff, or will lead to a multiplicity of suits.

Therefore, where the allegations of the plaintiffs were, that the defendants' (a corporation) proceedings, which were apparently valid, but really void, by causing an assessment, &c., would create a lien on their lands, and produce a cloud on their title, *held*, that this court would not assume equitable jurisdiction to review such proceedings, if there were no other reasons than the illegality or invalidity of them.

Dutchess Special Term, April, 1857.

MOTION to dissolve injunction.

THOS. MCKISSOCK, *for motion.*

J. W. BREWSTER, *opposed.*

EMOTT, Justice. The assessment of which the plaintiffs complain is not yet a lien on their lands or a cloud on their title, but their allegation is that the defendants' proceedings will or may finally terminate in such a result.

They apprehend that in attempting to enforce collection of the amount assessed, the defendants will make sales and execute conveyances, which will be apparently valid, and yet as they say really void, for the illegal proceedings of the defendants, and the invalidity of the assessment itself. The relief sought by the present suit, is a perpetual injunction against any pro-

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ceeding to collect the assessment in question, of any property of the plaintiffs.

I do not propose to discuss the question whether that peculiar exercise of equitable power by which the court decrees the cancellation or surrender of deeds or other instruments, which are what is called clouds upon the title of lands, can be invoked to arrest the proceedings of this corporation in their present stage, proceedings which it is only alleged may create or occasion such a cloud, but which have not yet produced that effect. Nor do I intend to examine any of the questions raised and argued as to this particular assessment, or the power of the trustees of the village of Newburgh, to grade a street anew, after it had once been levelled to a particular grade under their direction, or to do such work and collect a tax to pay the expense thus incurred, without having made an "estimate," of the cost before undertaking the work or making the assessment.

This injunction must be dissolved, for the reason that a court of equity will not assume jurisdiction to review the proceedings of a municipal corporation in prosecuting a local improvement, or in assessing or collecting the means to complete it, if there be no other reason for invoking the interposition of the court, than the alleged illegality or invalidity of the proceedings.

A court of equity has no supervisory power over such proceedings of public officers or jurisdiction, and ought not to interpose by injunction to restrain their action, merely upon an allegation that their proceedings are illegal or invalid. The common law writ of certiorari, is the proper remedy in such cases, and unless the acts of the corporation which are done or threatened in the prosecution of the work or the like, are alleged to be productive of peculiar or irreparable injury to the lands of the plaintiffs, or can be shown to lead to a multiplicity of suits; we ought not to extend our equitable jurisdiction to assume control of the proceedings or examine their regularity. The case of *The Mayor of Brooklyn agt. Meserole*, (26 Wend. 182,) was decided in the court of errors, explicitly

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and emphatically upon this ground, and the chancellor's order was reversed, because the case was not within any recognized head of equity jurisdiction.

The case of *Oakley* agt. *The Trustees of Williamsburgh*, (6 Paige, 362,) was decided before the case of *Meserole* agt. *The Mayor of Brooklyn*, and may, perhaps, also be distinguished as to its facts, both from that case and the present, by the allegation in the bill in the Williamsburgh case, that the grading which the defendants were proceeding to do, would, if completed, work material injury to the complainant's lands. In *Van Doren* agt. *The Mayor of New-York*, (9 Paige, 388,) the chancellor followed the rule given by the court of errors, though as it seems to me, hardly recognizing the entire scope of their decisions. In the recent case of *Boulton* agt. *The City of Brooklyn*, (15 Barb. 375,) the principle as I have stated it, is laid down and acted upon in this court, both by Mr. Justice STRONG, at special term, and by Mr. Justice BROWN, in delivering the opinion of the court, at general term, although I admit that the latter opinion lays much stress upon other considerations. The reasoning of the cases to which I have referred, furnishes to my mind satisfactory reasons for refusing injunctions in the class of cases to which the present action belongs, reasons which cannot be overcome by the hardship of particular cases. Nor am I loth to see any wholesome restriction upon the growing inclination to extend the use, or I might say the abuse, of this peculiar and extraordinary remedy of courts of equity. Of course, I need not advert to the fact, that notwithstanding the blending of common law and equitable jurisdiction in the same court, the principles as well as the method of the procedures, continue as different and distinct as they always have been. They must always be so, until the legislature see fit to sweep out of existence one or the other of the two systems, with both its rules and its remedies, as they have the separate tribunals by which they were formerly administered.

It is urged, that the defects in the defendant's proceedings, of which the plaintiffs complain, do not appear upon the rec-

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ord, or without extrinsic proof, and therefore, the objection could not be raised on a *certiorari*. This may be so, but there is nothing in the fact to distinguish the case from others involving a great variety of illegal and injurious acts by corporations and individuals, by which titles may be directly or remotely affected. Indeed, this element must always be found in all cases where the interposition of courts of equity is asked to remove what is called a cloud on the title. For if the defect be patent upon the face of the instruments or proceedings complained of, the answer of the courts has always been, that the cloud is too thin to need their aid to disperse it. And it must be remembered that it is of the class of cases where what is called a "cloud," is shown to exist—that is, where the conveyance or proceeding is apparently valid, though really defective—that the chief justice speaks in his opinion, in the court of errors, in the *Mayor of Brooklyn agt. Meserole*. If this element had not been found in that case, the suit must have been dismissed at once, for that reason, and without adverting to the public character of the proceedings complained of. It is to cases otherwise properly cognizable in equity, that the distinction is applied by the decisions, among which the case just referred to, is a leading instance, that when the proceedings of a subordinate public jurisdiction are concerned, courts of equity ought not to interfere.

The parties must be left to their remedies at law, unless the act complained of, will either lead to irreparable injury to lands or to a multiplicity of suits.

I cannot find either of these features in this case, and after a careful examination of the case in this aspect, I have come to the conclusion that the injunction must be dissolved, with costs of the motion.

Maria Smith, by her next friend agt. Smith.

SUPREME COURT.

MARIA SMITH, by HENRY MAYHEW, her next friend agt.
MARCUS SMITH.

"A party to an action or proceeding may be examined as a witness in his own behalf, the same as any other witness." (*Code* § 399, *as amended in 1857*.)

The question is, does this provision authorize a party to be examined as a witness on their own behalf, in an action between *husband and wife*?

Held, that although the language of the Code is broad enough to cover such a case, yet the courts should hesitate to believe that it was the intention of the legislature to make an innovation so dangerous upon the rules of the common law, relating to husband and wife.

Therefore *held*, in an action by the wife against the husband for divorce, on the ground of adultery, that she was an incompetent witness in the case, and no judgment could be rendered upon her evidence.

Orleans Special Term, August, 1857.

ACTION for divorce on account of the adultery of the defendant. The defendant did not appear, and the action was referred to a referee to take proof of the facts stated in the complaint, and to report his opinion thereon. The referee reported his opinion, that the material facts are true, &c., and also the evidence taken by him. The only witness to prove the entire case was the plaintiff. She stated the marriage, and facts tending strongly to establish the adultery of the defendant, as charged in the complaint.

W. M. WEBSTER, *for plaintiff*.

MARVIN, Justice. Was Maria Smith a competent witness?

"A party to an action or proceeding, may be examined as a witness in his own behalf, the same as any other witness." So reads the Code, as amended in 1857, § 399. Maria Smith is a party to the action against the defendant, her husband. The language of this provision clearly embraces her, and yet, one familiar with the rules of the common law, relating to husband

Maria Smith, by her next friend agt. Smith.

and wife, and the reasons assigned, time out of mind for those rules, would be likely to hesitate long, before coming to the conclusion that the legislature intended an innovation so dangerous to the peace of families, and the harmony of the domestic relations. At common law, neither the husband nor the wife, could be a witness for or against the other, and this rule was founded partly upon their legal rights and interests, and partly on principles of public policy. It was supposed to be essential to the happiness of social life, that the confidence subsisting between husband and wife, should be sacredly protected and cherished in its most unlimited extent; and that to break down or impair the great principles which protect the sanctity of that relation, would be to destroy the best solace of human existence. (1 *Green. Ev.* § 834, and the cases cited.)

So sacred were these principles regarded, that the supreme court of the United States, in *Stein agt. Bowman*, (13 *Pet.* 223,) held it error to admit the widow as a witness, to prove that her deceased husband had been bribed to give evidence in a cause.

The court say, that the principle rendered the husband and wife incompetent to disclose facts in evidence, in violation of the rule,—that the principle does not rest upon the discretion of the parties.

There are some exceptions to the rule, relating generally to cases of personal violence. As to the exceptions, see *Best on the Prin. of Ev.* §§ 160 to 164; *Green. Ev.* §§ 843 to 845.

Notwithstanding the principles upon which the rule is founded, I am not quite sure, but for the decisions which will be presently noticed, that I should not have held that the legislature, in declaring that, "A party to an action or proceeding, may be examined as a witness in his own behalf, the same as any other witness," had abrogated this rule, and that in all actions between husband and wife, either could be a witness against the other.

In the English statute, (6 and 7 *Vict. chap.* 85,) enacting that "no person offered as a witness shall be excluded, by reason of incapacity from interest, from giving evidence," it is care-

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fully provided that the act shall not render competent a party to the suit, &c., or *the husband or wife of such persons respectively.*

It is one of the original provisions of the Code, that "a party to an action may be examined as a witness, at the instance of the adverse party," (§ 890.) Under this provision, it was held, that in an action for a divorce for adultery, the defendant could not be examined as a witness for the plaintiff. (*Arbogast agt. Arbogast*, 8 *How. Pr. R.* 297.) In *Pillow agt. Bushnell*, (5 *Barb.* 154,) the action was by husband and wife for an assault and battery on the wife, and the defendant called the wife as a witness. It was held, that she was incompetent to testify for or against her husband; that the object of the statute was simply to remove the objection that previously existed, that a person could not be compelled to testify, because he was a party to the record. These cases are in principle, in point. The plaintiff was an incompetent witness in her own action against her husband, and no judgment can be rendered upon her evidence. She may take an order recommitting the action to the referee.

SUPREME COURT.

The People *ex rel.* SARAH W. PAULDING agt. PHILIP R. PAULDING.

In the Matter of GRACE M. PAULDING.

Where the temporary custody of a child, pending litigation between husband and wife for divorce, is given to the mother, the privilege should not be made an instrument of possible injustice to the father. Therefore, the father on sufficient cause shown, may require security from the mother that the child be kept within the jurisdiction of the court.

New-York Special Term, November, 1857.

APPLICATION for security pending litigation, that a child

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shall be kept within the jurisdiction of the court, by the parent having it in custody.

ROOSEVELT, Justice. This is a case of husband and wife, living, as the statute expresses it, (2 R. S. 149,) in a state of separation without being divorced. The wife, as she was authorized to do, some time since, applied to the court to have one of the children of the marriage, a girl less than three years old, delivered up to her. On a preliminary hearing of both parties, the charge and custody of the child, was awarded to the mother, accompanied by certain directions which were intended to provide fully for the father's right to visit his offspring pending the unhappy controversy, and subject to such modification (if any) of the order as the evidence, when more fully presented, should appear to demand.

The husband, on an affidavit of certain alleged intentions of his wife, now applies for an order that his wife be required to give security to keep the child within the jurisdiction of the court, to abide the final determination of the suit. Mrs. Paulding denies any such purpose as is imputed to her. She admits, however, that she contemplates a visit during the summer months, to one of the neighboring states of Massachusetts or Connecticut. Although such an excursion, with a view to health, may be every way unobjectionable, still it is proper that the husband, if he desires it, should have some security that the child shall be forthcoming when required. Both parents have rights, and the rights of both should be equally guarded. If the temporary custody, while the question is pending, be given to the mother, the privilege should not be made an instrument of possible injustice to the father.

Order for security accordingly.

SUPREME COURT.

FANNY J. SWEET agt. JAMES M. SWEET.

In an action for divorce on the ground of adultery, the defendant is not required to *verify* his answer, although the complaint is duly verified.

Adultery is not a criminal offence in this state, and although it is degrading to character, the *rules of evidence* will not excuse the *witness* from answering when the testimony is *relevant* and *material* to the issue.

The question then arises, whether the provisions of the Code relating to parties to the action being witnesses, (§§ 390, 399,) are applicable to an action between husband and wife?

This question was decided in the negative, in an action for divorce in the case of *Smith* agt. *Smith*, (*ante* p. 165.) And in 5 *Barb.* 156, and 8 *How.* 297, are cases giving construction to § 390 of the Code, holding that husband and wife cannot be used as witnesses for or against each other.

Besides, the defendant in an action for divorce for adultery, could not be compelled to disclose, as a witness, the act of adultery, and therefore would be privileged from answering under oath, for the reason that the penalties and forfeitures contained in the Revised Statutes against a party divorced for adultery, are sufficient at common law to excuse him from thus answering.

Erie Special Term, November, 1857.

MOTION to refer, in an action for a divorce for adultery, to take proof of the facts stated in the complaint, and to report opinion thereon. The complaint was verified. The defendant had served an answer *not verified*, and the plaintiff's attorney had returned it for this cause.

W. E. JOHNSON, *for plaintiff.*

MR. IRISH, *for defendant.*

MARVIN, Justice. The plaintiff's counsel insisted that the defendant should have verified his answer, and refers to §§ 156 and 157 of the Code, by which it is declared that when any pleading is verified, every subsequent pleading, except a demurrer, must be verified also. The verification may be omitted when an admission of the truth of the allegations

might subject the party to prosecution for a felony. To these provisions we must add, (*Sess. Laws* 1854, 153,) that "the verification of any pleading in any court of record in this state, may be omitted in all cases where the party called upon to verify, would be privileged from testifying as a witness to the truth of any matter denied by such pleading."

The plaintiff's counsel insisted that the defendant would not be privileged from testifying as a witness touching the facts alleged in the complaint, and cited 1 *Green. Ev.* §§ 344, 452, 454, 455.

It is true that adultery is not a criminal offence in this state, and although it is degrading to character, the rules of evidence, as I understand them, will not excuse the witness from answering when the testimony is *relevant* and *material* to the issue. (1 *Green. Ev.* 454.) Whether the defendant had committed adultery, as charged in the complaint, is certainly the *material* issue, and the counsel argued logically that under these rules of evidence he would be compellable to give evidence as a witness, and that, therefore, he could not be excused under the act of 1854, from verifying his answer. This argument, of course, assumes that the provisions of the Code, relating to parties to the action being witnesses, (§§ 390 399,) are applicable to an action between husband and wife. In *Smith agt. Smith*, (*ante* p. 165) I had occasion to examine the question arising under the 399th section of the Code, and I held that the wife in an action against her husband for a divorce, could not be a witness to prove the marriage and adultery. And in 5 *Barb.* 156, and 8 *How.* 297, are cases giving construction to § 390 of the Code, holding that they cannot be used as witnesses for or against each other. These decisions are applicable to the present case, and show that the defendant was not required to verify his answer. But aside from those cases, and the reasoning upon which the decisions therein are founded, I should hold that the defendant could not be compelled, in this action, to disclose as a witness, the act of adultery.

In England, proceedings for divorce are instituted in the

ecclesiastical courts, which, however, only adjudged a divorce *a mensa et thoro* for adultery, as for many other causes; and in parliament, where for adultery, a divorce *a vinculo matrimonii* may be granted. Our laws relating to divorces, are derived mainly from the English ecclesiastical courts, and we have conferred upon our court of chancery, the power which parliament possesses, in cases of adultery. It will be seen that we are not to look to English chancery law for divorce cases. In the ecclesiastical court, a *libel* was filed, and the defendant answered without oath. This practice has been pursued by statute in this state. (2 R. S. 144, § 39.) It is said that this provision of the Revised Statutes, is abrogated by the Code. Assume that it is, and in my opinion the law will not be changed. Had the statute contained no such provision, a defendant, charged with adultery in an action for a divorce, could not have been compelled, according to the settled practice of a court of equity, to answer the bill or complaint on oath.

A defendant is not bound to make discovery as to facts which will subject him to penalties or forfeitures, and he could at all times take the objection by demurrer to the discovery sought by the bill; thus if a daughter is to forfeit her portion in case she married without consent, or a widow her jointure or other provision under a will, in the event of her marrying again, or a lessee is to forfeit his lease, in case he assigns it without license, either of these persons may demur to a bill filed to discover the marriage, or the assignment of the lease. (*Story's Eq. Pl.* 442 to 448; *Wig. on Dis.* 62, 150.)

By the statute, if the wife obtains a decree dissolving the marriage, all her real estate, goods and things in action become her sole and absolute property. If the husband obtain such divorce, the wife is not entitled to dower in her husband's real estate, nor to any distributive share in his personal estate. The guilty party is prohibited from marrying again, until the death of the complainant. (2 R. S. 146, §§ 46, 47,

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48, 49.) These forfeitures and penalties are sufficient at common law to excuse a party from answering on oath. The same rules protect him as a witness. (1 *Green's Ev.* § 453.)

The defendant had a right to answer without oath.

The motion is denied.

SUPREME COURT.

EDWARD S. SANDFORD, President, &c. of the American and European Joint Stock Express Co. agt. THE BOARD OF SUPERVISORS OF NEW-YORK.

The constitution of this state (art. 8, § 1) declares that *corporations* may be formed under general laws; and by section 3 it is declared that the term "corporations" as used in this article, shall be construed to include all *associations or joint stock companies* having any of the powers or privileges not possessed by individuals or partnerships.

The legislature of this state in 1849 and 1854, passed laws authorizing, generally, the formation of associations or joint stock companies, under this provision of the constitution, and conferred on them many powers and privileges not possessed by individuals or partnerships. The plaintiffs in this case were organized and formed under these laws.

But strange as it may seem, the act of 1854, above referred to, after conferring upon these companies, additional powers and privileges, possessed only by corporations, closes with this remarkable declaration: "This act shall in no court be construed to give said associations any rights and privileges as corporations."

Held, that if the legislature meant by this, any other rights and privileges as corporations, than those conferred by said acts, all well. But if they intended to declare that such associations should not be *corporations*, after conferring on them, in accordance with the constitution, some of the powers and privileges of corporations, and which admit that if any such powers and privileges are conferred, they shall be deemed corporations, such declaration merely runs afoul of the constitution, and must yield to the provisions of the latter.

Held, also, that these joint stock associations being corporations, within the meaning of the constitution, they are liable to *taxation* on their capital, like all other corporations.

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New-York Special Term, February, 1858.

DEMURRER to complaint.

CLARENCE A. SEWARD, *for plaintiffs.*

A. R. LAWRENCE, JUN., *for defendants.*

DAVIES, Justice. The question presented for consideration in this case is, whether a joint stock association, organized under chapter 258, Laws of 1849, and chapter 245, Laws of 1854, is a corporation within the meaning of the laws relating to taxation, and as such, liable to be taxed on its capital? By section 1, of title 4, chapter 13, part 1, of the Revised Statutes, all moneyed or stock corporations deriving an income from their capital or otherwise, shall be liable to taxation on their capital.

By section 1, of art. 8 of the constitution of this state, it is declared that corporations may be formed under general laws, and by section 3, it is declared that the term "corporations" as used in this article, shall be construed to include all associations or joint stock companies having any of the powers or privileges not possessed by individuals or partnerships.

The legislature were therefore authorized to pass general laws, under which corporations might be formed, and the corporations thus authorized to be formed under general laws, were held to include all associations and joint stock companies having any of the powers or privileges of corporations not possessed by individuals or partnerships.

In pursuance of this authority, the legislature authorized the formation of corporations called joint stock companies and associations, by conferring on them some of the powers and privileges of corporations, such as that suits might be brought and be sued in the name of their president or treasurer, and such suits were to have the same force and effect as if brought in the name of or against the shareholders or associates.

That no suit commenced shall abate by reason of the death of the officer in whose name it was commenced, or against

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whom it was prosecuted, but that the same shall be continued in the name of his successor in office.

That such officer shall not be liable in his own person or property by reason of any such suit commenced by him, or prosecuted against him.

And section fifth declares that nothing therein contained shall be construed to confer on such joint stock companies or associations, any of the rights and privileges of corporations, except as therein specially provided.

Herein is a plain and unequivocal legislative declaration, that some of the rights and privileges of corporations were conferred upon the joint stock companies or associations organized under that act.

*The Constitution
1. ... not an original
provision - s. 1. art. 1
+ added by
the act of 1854*

The act of 1854 confers additional rights and privileges on these companies or associations, peculiar to corporations; but contains a provision that that act should in no court be construed to give said associations any rights and privileges as corporations.

I am at a loss to understand this legislative declaration. The constitution only authorized the formation of corporations under general laws, and declares that such term "corporations" shall be held to include all associations and joint stock companies having *any* of the powers or privileges of corporations not possessed by individuals or partnerships.

The legislature then provided by a general law for the formation of such corporations, by conferring on them some of the powers and privileges, not possessed by individuals or partnerships, and declared that the act shall not be construed to confer any of the rights and privileges of corporations, except as therein specially provided.

Then, the act of 1854 confers additional powers and privileges, possessed only by corporations, and ends with the declaration that no court shall construe it as giving to said associations any rights and privileges as corporations. I think this must mean any other rights and privileges than those conferred; otherwise, it destroys itself. That certainly could not have been the intention of the legislature. A corporation is

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succinctly and well defined by Judge BRONSON, in *The People agt. The Assessors of Watertown*, (1 *Hill*, p. 620.) He says: "A corporation aggregate is a collection of individuals united in one body, under such a grant of privileges as secures a succession of members without changing the identity of the body, and constitutes the members for the time being, one artificial person or legal being, capable of transacting some kind of legal business, like a natural person."

This definition embraces the powers and privileges conferred by the legislature on these companies or associations; and after they have been conferred, is it sound to say that the legislature intended to say, that no court should hold that they were conferred? I cannot yield my assent to such a construction of the act of the legislature. A similar argument was used in reference to the association organized under the banking law of 1838. The legislature in passing that act, certainly did not intend that the association organized under it, should be corporations in the same sense used in the constitution of 1821.

Judge BRONSON says in reference to this, "it may be true, as argued, that the legislature intended to make a legal being, and give it all the essential attributes of a corporate body, and yet that it should not be a corporation. That the legislature could not do. I do not refer to any written constitution. The constitution of things, the order of nature, forbids it. Human powers are not equal to the task of changing a thing, by merely changing its name."

Judge BRONSON also says: "But whether a corporation or not, does not depend upon the numbers or magnitude of its powers, nor the manner in which they were conferred—an association under our general laws, for a village library, or to tan hides, possesses all the essential attributes of a corporation in as great perfection as the Bank of England, or the East India Company. Nor is it important in what mode or by what name or particular agency, this artificial being transacts its business. It is enough that it has capacity in some form to act as a legal being."

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I think, therefore, that in obedience to the express mandate of the constitution, and to long and well established legal principles, we must hold that these associations or companies formed under these general laws are corporations, and that if the legislature has declared that such associations shall not be corporations, after conferring on them, in accordance with the constitution, some of the powers and privileges of corporations, and which admit that if any such powers and privileges are conferred, they shall be deemed corporations, such legislative declaration, must yield to the constitution, and be regarded as inoperative.

If the construction contended for by the plaintiff is correct, it cannot control and nullify the constitutional enactments.

Having arrived at the conclusion that this joint stock association is a corporation, within the meaning of the constitution, it follows that it is liable to taxation on its capital, like all other corporations. (*Mutual Insurance Co. of Buffalo agt. Supervisors of Erie*, 4 Com. 444.)

And there is no hardship in this case upon the owners of the stock of this association. The property represented by this stock is liable to taxation, like all other property. It can only be taxed once. Those owning it, are entitled to have the amount owned by them in this corporation, deducted from their personal estate, and the property of the corporation contributes, therefore, its equal and just proportion only, to the burden of taxation.

The complaint does not, therefore, set forth facts sufficient to entitle the plaintiffs to the relief asked for, and there must be consequently judgment for the defendants on the demurrer, with costs.

The People ex rel. Supers of Poor of Monroe agt. Comr's of Emigration.

SUPREME COURT.

**The People ex rel. THE COUNTY SUPERINTENDENTS OF THE
POOR OF MONROE COUNTY agt. THE COMMISSIONERS OF
EMIGRATION.**

Under the "act concerning passengers in vessels, coming to the city of New-York," passed May 5, 1847, the commissioners of emigration are equally liable for "*temporary relief*," as for permanent support, furnished by towns, cities and counties to pauper emigrants under that act, although *not rendered in the county poor house*.

Temporary relief to a pauper, is a duty enjoined by our poor laws upon overseers and superintendents of the poor, equally with permanent maintenance and support. Indeed, they should be regarded in reference to the provisions of the act above referred to, as convertible terms.

The remedy of superintendents of the poor of a county, to compel the commissioners of emigration to credit and allow their proper accounts, and provide for their payment, is by *mandamus*.

Ontario Special Term, April, 1857.

At a special term held before Mr. Justice SMITH, in Monroe county, on the second day of February, 1857, an order was made that the defendants show cause on, &c., why a mandamus should not issue to compel the defendants to allow and pass to the credit of the relators, and provide for the payment of the same out of any moneys in the hands of the defendants applicable thereto, the account of the relators for relief to certain persons therein, as presented to said defendants for the month of December, 1856, and as with said order also particularly to be shown.

The order was granted upon an affidavit made by one of the relators, showing among other things, that during the month of December, 1856, the relators furnished to the persons whose names are included in a list or schedule marked "A," annexed to the affidavit, the several sums set opposite the name or each. That such sums were paid to or for such persons as poor persons in said county of Monroe, and who were in each and every case in poor and destitute circumstances, requiring temporary relief, and temporary relief only, and such as could and should more properly be provided to such persons at their

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respective places of residence, than at the Monroe county poor-house. That said several persons having no settlement in any city or town of said county, and aside from the aid to which they would be entitled from the emigrant or commutation fund, or which said county would be entitled to receive for or on account of such persons, the said persons would be chargeable solely on the said county of Monroe, so far as they should require public aid.

That said several persons named in said schedule, have, within the last five years, arrived at the port of New-York as emigrants, and who have paid, or on whose account the commutation money provided and required by the statute, has been paid, and on whose account the bond in said statute required has been given; and that said several persons still remain a charge on the commissioners of emigration, and on the fund raised and to be raised by such commutations as the books of said commissioners show, and as they, the said commissioners, admit.

That after the expiration of the said month of December, 1856, the relators made out an account of the moneys so actually paid, with the date and amount, and for what purpose paid, and sent the same forward to the defendants, duly verified for their consideration and allowance; and that the defendants might place the same or the amount thereof to the credit of said county on the books of the defendants, and with a request that they would provide for the payment thereof out of the commutation money, and out of any money that may have been or may be raised or collected on said bonds, as the defendants were in duty bound to do.

That said several poor persons were aided and provided for by the relators as other poor persons charged on said county were aided, and not otherwise; and that the relators inquired into each case separately on the oath of the applicant for relief, and granted the same only in the cases provided by law, and in each case sent forward said proof to the defendants.

That the defendants rejected said account and refused to allow the same in the whole and every part thereof, for no

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other reason than that said amount was for temporary relief, and that the defendants had resolved to pay no charges for temporary relief, or of a like kind, except the same were rendered in the county poor-house; that the defendants have never provided any place or way to take care of said poor persons, and have paid no part or portion of the expense of such place within the said county or elsewhere for their aid, support or maintenance.

The schedule annexed, referred to in the affidavit, contains a list of seventy-two names, with an amount set opposite to each, amounting, in the aggregate, to rising of \$200.

The defendants now appear, and by way of showing cause, &c., set forth in a verified return or answer, to the above order and affidavit, that the amounts of money received by them as and for commutation money of bonds mentioned in chapter 195 of the Laws of 1847, and the various laws in addition thereto, or amendatory thereof, or from bonds given under said chapter or laws, have all been expended by them, the defendants, in indemnifying the various cities, towns and counties of the state, under and pursuant to said chapter and laws, and in maintaining and supporting the persons or passengers mentioned and described in said chapter and laws.

That they have not now any money or funds in their possession, or under their control, for any purpose whatever, except such as they obtain by way of loan, but that they are overdrawn at the bank in which are deposited all the moneys paid, belonging or coming to them, and that they have been thus without funds, and overdrawn, for more than three months, and that they now have pending before the legislature an application to enable them to meet and pay the expenses and charges which the various cities, towns and counties of this state have incurred for the support and maintenance of emigrant passengers, who have arrived at the port of New-York, and which expenses the defendants, had they been in funds, were required to pay under the provisions of said chapter and laws, which expenses and charges exceed one hundred thousand dollars.

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That the claims made by the relators in their papers in said matter, were respectively for temporary relief only, and as the defendants are advised, they are prohibited by law from paying or appropriating any of such money to the payment of claims of that nature, or any of them, and without further inquiry in regard thereto, refused to admit them in the account between the relators and the defendants, and rejected them.

That they, the defendants, never gave any orders or directions or authority for the persons mentioned in the said schedule, to be sent forward to them, the said defendants; and that they, the defendants, have prescribed rules and regulations, under and pursuant to and for the purposes mentioned in section five of said chapter.

This answer is dated and sworn to April 2d, 1857.

The relators now move that a peremptory mandamus issue, commanding the defendants to allow and pass the said account as stated in the order to show cause.

W. C. ROWLEY, *for the relators.*

J. C. DEVELIN, *for the defendants.*

WELLES, Justice. The counsel for the defendants, contends that the relators' remedy, if they are entitled to any, is not by mandamus. It seems to me, however, that if the relators are right upon the main question upon the merits, they are entitled to the remedy they ask for. The 4th section of the act entitled, "An act concerning passengers in vessels coming to the city of New-York," passed May 5th, 1847, (*Sess. L. of 1847, p. 182.*) declares it to be the duty of the commissioners of emigration to provide for the maintenance and support of such of the persons for whom commutation money shall have been paid, or on whose account bonds shall have been taken as in said act is provided, as would otherwise become a charge upon any city, town or county of this state, and requires the commissioners to appropriate the moneys for that purpose, in such manner as to indemnify, as

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far as may be, the said cities, towns and counties for any expense or charge which may be incurred for the maintenance and support of the persons aforesaid, in proportion to the expenses incurred by such cities, towns and counties severally, for such maintenance and support.

When the present claim of the relators was presented to the defendants, it was rejected as not being provided for by the act in question, for the reason that the expenses incurred were for temporary relief only, and that the relief afforded to the emigrants named in the papers, was not rendered in the county poor-house; no other objection was made to the allowance of the claim. The affidavit on the part of the relators, which is in no respects controverted, seems to present a clear case for the allowance of their claim to be reimbursed for the moneys paid for the emigrants, or at least, to entitle them to have the same recognized by the defendants, and by them placed to the credit of the relators on the books of the former, so as to be in a condition to receive the money therefor, or some part thereof, when, and as fast as there should be funds in the hands of the defendants or under their control, applicable to that purpose, unless the particular objection, made by the defendants, be sound and tenable. If the defendants are wrong in their legal views of the relators' rights in this respect, they are shown to be in the neglect of a plain legal duty; are omitting, to the injury of the relators, the performance of an act which the law enjoins upon them.

If an action would lie, which I do not believe, it would afford but a doubtful and inadequate remedy. Nor am I able to perceive that a common law *certiorari* would be of any service to the relators.

It becomes necessary, therefore, to consider, whether the act referred to, contemplates or embraces repayment to the relators, of moneys paid to or for pauper emigrants for temporary relief. The language employed by the statute is "maintenance and support." But the act nowhere indicates in what manner the maintenance and support are to be rendered.

Temporary relief to a pauper is a duty enjoined by our

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poor laws upon overseers and superintendents of the poor, equally with permanent maintenance and support. They are either of them a public burden, and temporary relief is a species of support. Indeed, it seems to me they should be regarded, in reference to the provisions of the act referred to, as convertible terms. No reason is perceived why any distinction should be made between them. Upon the whole, I incline to the opinion that the temporary relief, provided by the relators to the emigrants in this case, is within the scope and object of the act, and that the defendants ought to have entertained the application to have the same placed to the credit of the relators upon their account books, and to provide for its payment out of any money in their hands, or under their control, applicable to such payment. A peremptory mandamus should therefore issue, substantially as stated in the order to show cause.

SUPREME COURT.

THE MERCHANTS' INSURANCE Co. agt. RICHARD H. HINMAN and wife, and others.

Is a *widow* who has received her distributive share of her deceased husband's personal estate, under any circumstances, bound by law to refund?

That depends upon the proper construction of the words "next of kin," used in the Revised Statutes upon this subject. Sometimes this term "next of kin," is used as comprehending the widow, and sometimes as contradistinguished from her. Its true meaning in any given instance, must depend upon the context and the consequences.

The Revised Statutes, (2 R. S. 89,) provide that in case any suit shall be brought upon a claim which shall not have been presented to the administrator of a deceased person, within six months from the first publication of the notice prescribed by law, such administrator shall not be chargeable for any assets he may have paid "in making distribution to the next of kin, before such suit was commenced;" "but any creditor (§ 45,) who may have neglected his claims, may, notwithstanding, recover the same in the manner prescribed by law, of the next of kin of the deceased, to whom any assets shall have been paid or distributed."

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Held, that the term next of kin in these provisions, is not used in its strict sense of blood relatives, but with the more enlarged meaning of all relatives of the testator, to whom any assets shall have been paid; and consequently includes the widow, the same as other relatives who have received portions of the personal estate.

In an action after mortgage foreclosure, against the widow, who had received a portion of her deceased husband's personal estate, to recover a balance due on the bond executed by the husband, *held*, that the action was properly brought against the widow, and the claim made against her, as next of kin of the deceased husband.

New-York Special Term, October, 1857.

·ROOSEVELT, Justice. The plaintiffs' claim is founded on a bond of Thomas Lewis, deceased, for \$20,000. Although secured by a mortgage, which has been regularly foreclosed, a large balance, exceeding \$7,000, remains unsatisfied; and it is insisted that the widow, as well as the other next of kin of the deceased mortgagor, (his personal estate having been divided among them,) is bound to refund, to the extent of the plaintiff's claim.

The widow and her second husband, she having married again, demur to the demand, and thus admit the allegation, made in the complaint, that they received, or rather that she as widow of the deceased intestate, received of his personal estate, \$18,109, a sum, as will be seen, greatly beyond what is necessary to meet the required contribution. The case, therefore, presents the single question, whether a widow, who has received her distributive share of her deceased husband's personal estate, is, under any circumstances, bound by law to refund?

Where a party dies intestate, the statute provides, (2 R. S. 96,) that "the surplus of his personal estate, remaining *after payment of debts*, shall be distributed to the widow, children, or next of kin." Creditors, therefore, before a distribution, it is obvious, have the prior claim, in law as in moral honesty. Does the fact of distribution, so far at least as the widow is concerned, destroy their rights, or which is the same thing, deprive them of all remedy?

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In case any suit shall be brought upon a claim which shall not have been presented to the administrator of a deceased person, within six months from the first publication of the notice prescribed by law, it is provided, (2 *R. S.* 89,) that such administrator shall not be chargeable for any assets he may have paid "in making distribution to the next of kin, before such suit was commenced;" "but any creditor (§ 45,) who may have neglected to present his claims, may, notwithstanding recover the same, in the manner prescribed by law, of the next of kin of the deceased, to whom any of the assets shall have been paid or distributed."

What, then, is the manner prescribed by law, and who are the next of kin, intended to be made liable?

Actions, (says the statute, regulating the remedies of creditors in such cases,) against "the next of kin" of any deceased person, to recover the value of any assets that may have been paid to them, may be brought against all of the "said relatives," jointly, or one or more of them, for the amount received by each of them, (2 *R. S.* 451.) And no allowance or deduction is to be made on account of there being "other relatives," to whom assets have also been delivered. But any one "of the next of kin," so made liable, may maintain an action against "all the other relatives of the testator," who may have received any portion of the assets, or against any of them separately, "for a just and equal contribution."

It will thus be seen that the term next of kin, in these provisions, is not used in the strict sense of blood relatives, but with the more enlarged meaning of "all relatives" of the testator, "to whom any assets shall have been paid." The legislature would appear to have had in view, not so much the kinship as the relationship, be it that of blood or marriage, which constituted in the eye of the law, a basis for the claim to a distributive share. The obligation was attached to the right—the burden to the bounty. Numerous instances of the judicial use of the term next of kin, in the sense indicated, will be found cited by counsel in a case in 18 *Vesey*, 50. All the authorities—although somewhat conflicting in other respects—

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agree in this, that the words may be interpreted in that sense, if the context of the statute or instrument, would seem to require such an interpretation. Now, there is no reasonable mode of effectuating the provision that the widow, as well as the other relatives of deceased persons, is only to take the assets "remaining after payment of debts," except by the construction contended for. Suppose a case, not of unfrequent occurrence, in which the widow, no matter how large the estate, takes the whole; in such case, unless she can be made liable as a relative or next of kin, the creditor in twelve months after his debtor's decease, may be wholly remediless. Such a statute of limitations, with no saving in favor of absentees or minors, or victims of accident, would be too rigorous for endurance. No legislature should be presumed to have so exercised its powers.

Her own rights also, as well as the rights of her husband's creditors, require that the widow should, in some respects, at least, be treated as one of his next of kin. Among other instances, the notice of appraisement is only required to be served on "the next of kin," (2 R. S. 82;) the right to demand an accounting is confined to the creditors and "next of kin," (p. 92;) the right to be cited to attend the accounting, is limited to the creditors and next of kin," (p. 93.) Can it be presumed that the widow, having generally the larger, and sometimes the sole interest in the appraisement or accounting, was intended in these provisions, to be entirely overlooked?

A careful examination and comparison of the different sections of the several statutes on the subject, have led me to the conclusion that the terms "next of kin," are sometimes used as comprehending the widow, and sometimes as contradistinguished from her; that their true meaning, in any given instance, must depend upon the context and the consequences; and that in the section more particularly under consideration, she was intended to be embraced in the same manner as other relatives receiving portions of the estate.

Demurrer overruled, and judgment for plaintiff, with costs.

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SUPREME COURT.

THE PEOPLE OF THE STATE OF NEW-YORK agt. ANDREW McCUMBER and others.

"Sham and irrelevant answers and defences may be stricken out on motion." So says the Code, (§ 152.) It is not proper, therefore, to limit this unqualified language to answers and defences *setting up new matter*. Pleadings containing *mere denials* of the plaintiff's allegations, may be made to work injustice and delays, as effectually as those setting up affirmative defences.

This power of striking out should be cautiously exercised, for it may do injustice to the defence, as it disposes of the pleadings, and strikes them from the record in a summary way. Yet if the answer alleged to be sham, contain, as it may, matter, which if true, would constitute a defence to the action, redress by *appeal* may be had. If the answer does not involve the merits, or affect a substantial right, it ought to be stricken out.

It seems, that motions to strike out sham and irrelevant defences, (§ 152,) for judgment on overruling frivolous defences, (§ 247,) for expunging irrelevant and redundant matter, and for compulsorily amending uncertain allegations, (§ 160,) may, in a proper case, all be combined in one motion; the party applying, taking the hazard of having his motion denied, if he asks what ought not to be granted, and to costs, if he asks too much.

It seems, that an averment in a complaint being absolute and unequivocal, and supported by an oath of positive knowledge, and that in the answer being merely on information sufficient to form a belief, the defendant is bound on a notice of motion to set aside the answer as sham, to support it by the oath of a party having knowledge. That is, it is a case where the defendant is bound to seek for knowledge.

In this case, the motion asked for two kinds of relief—to strike out sham and irrelevant matters, and for judgment on the expurgated answer as frivolous. All the pleadings were verified. The several denials and allegations constituting the first defence in the answer, were struck out as sham or irrelevant; and the remaining defences overruled as frivolous, and judgment for the plaintiffs. Costs of making and opposing motion to abide event. Leave to serve an amended answer.

Albany Special Term, February, 1858.

MOTION for judgment for plaintiff on account of the answer being sham and frivolous.

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LYMAN TREMAIN, *Attorney-General, for plaintiffs.*

Gen. AMASA J. PARKER, *for defendants.*

HOGKBOOM, Justice. The language of the Code, (§ 152,) is without qualification, that "sham and irrelevant answers and defences, may be stricken out on motion." It does not, therefore, seem proper to limit its application to answers and defences setting up new matter. Nor would this accomplish the object doubtless intended by the legislature, to wit, to uproot defences not resting on truth and good faith. Improper delays and contrivances to defeat justice may be as effectually carried out through the agency of pleadings containing mere denials of the plaintiff's allegations, as by those setting up affirmative defences. The later decisions sustain this construction of the statute, and I am disposed to adopt it. (*Conklin* agt. *Vandervoort*, 7 *How. Pr. Rep.* 483; *Ostrom* agt. *Bixby*, 9 *Ib.* 87; *Stiles* agt. *Comstock*, 9 *Ib.* 48; *Cutlin* agt. *Gunter*, 1 *Duer*, 265; *Manufacturers' Bank of Rochester* agt. *Hitchcock*, 14 *Howard*, 406.)

This power should, it is true, be cautiously exercised, for it disposes of the defendant's pleading in a very summary way, and may do him injustice, as it strikes his defence from the record. And yet if the answer alleged to be sham, contain, as it may, matter which if true, would constitute a defence to the action, he may obtain redress on appeal to the general term, or failing there, to the court of appeals. (*Code*, §§ 349, 11.) If the answer does not involve the merits of the action or affect a substantial right, it ought not to be permitted to stand.

The policy of the Code is to bring pleadings to the test of truth and substance. Hence sham and irrelevant defences may be stricken out on motion, (§ 152.) Frivolous defences may be overruled and judgment given in a summary way, (§ 247.) Irrelevant and redundant matter may be expurgated, and indefinite and uncertain allegations may be compulsorily amended, (§ 160.) The object of all this, is to present, for judicial examination, simply the true and substantial issues between the parties. Nor do I see, why, in a proper case, these

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several motions may not be combined in one, and the several defects remedied on a single application. There may be doubts under which section relief should be afforded, and so long as the nature and object of the motion are distinctly stated, it may contribute to economy and expedition, to connect together these various applications for relief. The party applying must take the hazard of having his motion denied, if he asks what ought not to be granted, and of being possibly subjected to costs if he asks too much. With these restrictions, the practice is not censurable.

In the present case, the motion asks for two kinds of relief, viz: to strike out sham and irrelevant matters, and for judgment on the expurgated answer as frivolous.

The action is to recover of the defendants, as sureties of the Chemung County Bank, moneys deposited in that bank for canal tolls. The answer sets up matter both in denial and avoidance. That in denial of the plaintiffs' allegations is claimed to be sham and irrelevant; and that in avoidance is claimed to be frivolous. It will be necessary to examine it in detail. Both the complaint and answer are verified; but it is to be observed in the first place, that every allegation in the complaint is made upon actual knowledge, and every allegation of denial in the answer, with a single exception as to the *delivery* of the bond, is upon information and belief. In this form the defendants deny the designation of the bank to receive canal tolls, but it is recited on and admitted by the bond itself, and that is sufficient. They deny that they delivered the bond to the plaintiffs, otherwise than by leaving it with their principal, Mr. Hastings. It should, I think, be inferred that this was for the purpose of being delivered to the plaintiffs. But aside from this, they expressly admit that they executed the bond; and in another place, that they made the bond; and in still another, that the plaintiffs took from them the bond. I think they have fairly nullified their own denial. They deny that it was executed or delivered in pursuance of any statute; but this is but a denial of a legal conclusion. They deny that the bank has not rendered an account of *all*

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the moneys deposited therewith, but the breach counted on is that the bank has not accounted *for* and paid over all the moneys deposited therewith; and they admit that the bank has not paid over all the toll moneys deposited in the bank, which is sufficient to entitle the plaintiff to recover; and the other allegation may be rejected as immaterial. I am inclined also to think, that the averment in the complaint being absolute and unequivocal, and supported by an oath of positive knowledge; and that in the answer being merely on information sufficient to form a belief, the defendants were bound on a notice of motion to set aside the answer as sham, to support it by the oath of a party having knowledge. Indeed it may be questioned, whether this is not one of those cases where the defendants were bound to seek for knowledge and learn the facts, if they wished to interpose a defence. (*Hanee agt. Remming*, 1 *Code Rep. N. S.* 204; 2 *E. D. Smith's Rep.* 48; *Chapman agt. Palmer*, 12 *Howard*, 38; *Fales agt. Hicks*, 12 *Howard*, 153.) But I do not put the decision on that ground, as I have not made up my mind to what precise extent such a rule should be applied. It is further to be observed, that this particular denial is simply of information, (and not also of knowledge,) sufficient to form a belief, and is probably defective on that ground. (*Edwards agt. Lent*, 8 *Howard*, 28; *Code*, § 149.) The defendants further deny, that they have become liable to the plaintiffs for the moneys deposited, but this is not an issuable allegation. The same remark applies to the denial of the defendants' liability in another part of the answer, and also to the denial of the accruing of any cause of action.

They deny in the same way, that the sum of money claimed, or any sum whatever, is due to the plaintiffs, and I should regard this as presenting a substantial issue, were it not reasonably obvious that it was intended as a mere denial of their *legal* liability. If intended otherwise, it is only a denial on information and belief. And in a cause where it is at least doubtful whether they must not be supposed to possess, or were not bound to acquire positive knowledge, (*see cases before cited*), and in a case too, where the verified allegation in the complaint is

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made on actual knowledge and supported by a positive affidavit, served with the notice of motion, and not met by any counter affidavit on the part of the defence, under such circumstances, I think I must regard the answer as sham. The defendants further deny, that the bank has refused or neglected to answer upon sight the drafts of the treasurer. This is relied upon with some confidence, as constituting an issuable fact, on which the defendants have a right to a trial, but it is not one of the facts actually alleged in the complaint as a cause of action. Nor do I think it is necessarily so in legal effect, as the treasurer was not bound to demand payment by sight drafts, and may also have relied for a recovery upon moneys deposited in the bank at the date of the bond. I think the defendants should, at least, have accompanied this allegation with one that the plaintiffs' cause of action was founded, at least in part, upon the alleged neglect or refusal of the bank to pay the sight drafts of the treasurer. The omission of this allegation makes the other, I think, immaterial or irrelevant; besides the plaintiffs' allegations are also in this particular supported by the positive oath of actual knowledge, appended to the complaint, and a positive affidavit accompanying the notice of motion of the bank's refusal to pay a sight draft of the treasurer. This falsifies the answer, which receiving no corroboration from any other source, although an opportunity was afforded, must be condemned as sham.

The second defence, in substance alleges that there did not exist in law or in fact, any such bank or corporation, known or called the Chemung County Bank. As a question of fact, I think the defendants are estopped from denying its existence, having in their bond admitted its existence, and covenanted for its faithful performance of its contract. As a question of fact, also, the evidence is quite preponderating in favor of the existence of such an institution, and the allegation might, if necessary, be rejected as sham. But it was obviously designed as an averment, that there was no such legal entity as the Chemung County Bank, and considered in that light, and look-

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ing at this defence by itself, it does not contain the necessary averments to establish this conclusion, and the defence may, therefore, be overruled as insufficient or frivolous.

8d. The real defence intended to be interposed on this part of the case is spread out in the third part of the answer; and is in substance that the Chemung County Bank is not a corporation nor banking association, but another name for William T. Hastings, an individual banker, doing business under the general banking law, under that designation, and that the canal board had no power to designate such an institution or individual to receive canal tolls. Assuming the allegations in the answer to be sufficient to raise that question, I am of the opinion that it constitutes no defence to the action; in other words, that the canal board are not disabled from selecting the institution of an individual banker, as a place of deposit for canal tolls. I do not find in the law any words prohibiting them from selecting any proper or responsible depository for that purpose. And as they have the general superintendence and control of that subject, the authority would seem to attach to them by necessary implication. But waiving that question, and whatever may be the aspect of the case as between the canal board and the people themselves, I think the defendants, as sureties for a party who does not take the objection, are estopped from denying their liability. Their principal has received the money, and they have covenanted for its payment to the state. The plaintiffs' claim is stamped with the highest equity, and it is not offensive to any principle of sound morality or enlightened public policy. Admitting the statutory provision as to the place of deposit to be restrictive, I think the words banking association in the connection in which they stand, are employed as a term of designation for all institutions under the general banking law, whether those of associated or individual bankers. Such is expressly declared to be the meaning of the term under another statute. (*Laws of 1849, chap. 487.*) Besides, under another provision of law, banking corporations may be designated as places of deposit. This in-

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stitution has a president, and cashier and board of directors. It has a corporate seal. It has, by the act of incorporation, certain legal capacities. Individual bankers have also, by a late decision of this court at general term, been pronounced corporations sole, (*Bank of Havana* agt. *Frazer*, in manuscript.) I do not feel at liberty at special term, to disregard such an adjudication. On the contrary, a decision in point adverse to the answer, is held good ground for treating it as frivolous. (*Bank of Wilmington* agt. *Barnes*, 4 *Abbott*, 227.) No injury can result from such a disposition of it. The answer remains on the record, and can be more expeditiously reviewed in a higher tribunal.

The several denials and allegations constituting the first defence in the answer, must be struck out as sham or irrelevant. And the remaining defences must be overruled as frivolous, and judgment be given for the plaintiffs thereon. Ten dollars costs of making and opposing the motion, may abide the event of the action. As the defendants' attorneys have interposed an affidavit of good faith, the defendants may have ten days after notice of the order, to serve an amended answer.

SUPREME COURT.

THE AMERICAN EXCHANGE BANK agt. GEORGE WEBB and others.

Where plaintiffs, as judgment creditors, commenced an action to set aside an assignment made for the benefit of creditors, on the ground, 1st: that the assignor absconded immediately on the execution of the assignment, taking with him a portion of his estate:

2d. That debts to a large amount, preferred and directed by the assignment to be paid to the wife of the assignor, were fictitious, and had no existence in fact:

Held, that the case of *Wilson agt. Forsyth*, (24 Barb. 105,) was authority conclusive, that the first ground could not be sustained.

On the second ground, it appeared that there was evidence that the assignor must have received some moneys belonging to the separate estate of his wife; that the assignor, at the time of executing the assignment possessed a large real estate in which his wife had an inchoate right of dower; that the plaintiffs at different times, had written notice from the assignee, before a sale of the real estate, that the wife of the assignor was willing to unite with him (the assignee) in making a perfect title, and relinquishing her right of dower, provided the assignee was not interfered with in executing the trusts in the assignment; and a proposition to have the sale at a certain time if no objection were interposed by the creditors: The plaintiffs in their reply acceded to the time proposed to sell.

Held, that the plaintiffs having had full notice that the wife of the assignor had consented to release her dower in the assigned estate, and that it would be sold free from such claim, on the condition that she was to receive from the assignee the amount provided for her in the assignment; the property having been so sold, and the release of dower executed, it was too late in the day for the plaintiffs to seek to deprive the wife of this fund, and to set aside the assignment on the ground that no debt was due to her. They were estopped from taking any such proceeding. Complaint dismissed, with costs.

New-York Special Term, February, 1858.

BILL filed to set aside an assignment made by defendant George Webb.

The principal grounds relied on to set aside this assignment as fraudulent and void, as to the plaintiffs, judgment creditors of Webb, are two.

First: that the debts of \$10,000 and \$7,500, preferred and di-

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rected by it to be paid to Mrs. Webb, the wife of the assignor, are fictitious, and have no existence in fact. *Second*: that the assignor absconded immediately on the execution of his assignment, taking with him a portion of his estate, and that such acts render the assignment fraudulent and void.

G. N. TITUS, *for plaintiffs*.

JOHN W. EDMONDS and W. C. NOYES, *for defendants*.

DAVIES, Justice. As to the second objection to this assignment, I find that the whole ground covered by it, is disposed of by the decision of this court, in *Wilson agt. Forsyth*, (24 Barb. 105.) The points ruled in that case are: to render an assignment void when not void on its face, as a matter of law, the fact of a fraudulent intent in making it, must be proved and found from evidence that will fairly support the finding.

That it is erroneous to charge the jury, that if the assignor on absconding after executing the assignment, carried off a sum of money with him, the assignment is void, (the sum taken being \$5,000;) and that it becomes the duty of the jury to find that it was executed with intent to hinder, delay and defraud creditors.

That it is also erroneous to charge that if the assignor, when he executed the assignment, intended to reserve a large sum of money to his own use, and did take it away with him, after the assignment was made, the case is the same as if the money had been reserved to the use of the assignor on the face of the assignment.

It seems to me that this decision relieves this case from the embarrassments caused by the acts of the assignor in the present one.

They seem to be of the same character as those of the assignor in that case.

Then, as to the first ground of objection to this assignment, the fraudulent character of the debt, to Mrs. Webb.

There is, certainly, evidence tending to show that the assignor must have received moneys belonging to the separate

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estate of his wife, and the payment of which, to her, this court would sanction, as eminently just and proper. But I am unable to discover that the amount could at all equal that mentioned in the assignment; and it may be, if the case stood only on this preference, that the assignment could only be maintained for the amount actually due to Mrs. Webb.

I am not prepared to say that it is absolutely void, as to all the creditors, or even as to her, if the assignor has assumed he was indebted to her in a larger sum than he actually owed.

But in the view I take of this case, such inquiry and investigation are not necessary. The assignor, at the time of the execution of the assignment, possessed a large real estate, in which his wife had an inchoate right of dower.

This real estate, the assignee was desirous of selling, as it was his duty to do. It was obvious that a sale subject to this dower interest, would greatly diminish the value of the estate, disincline persons to purchase, and manifestly present a serious obstacle to the sale.

To relieve the estate from this embarrassment, the assignee, acting as such, as well as for Mrs. Webb, sent to the creditors and to the plaintiffs, the circular marked exhibits B. and C., and received from the plaintiffs, replies marked D. and E.

The circular marked B., is under date of September 5, 1854, and states that he is desirous of ascertaining the particulars of the assignor's indebtedness, and adds that he will furnish to each creditor a statement of the debts, and of the property assigned. He also states that "if there is no litigation to embarrass the assignee, (and he believes there will be none,) he will sell the assigned estate at public auction in the latter part of the month of January next, when it is thought it will bring a good price. If the sale takes place as intended, Mrs. Webb has expressed her willingness to unite with the assignee in making a perfect title and relinquish her right of dower."

In reply to this circular, the plaintiffs transmitted to the assignee exhibit D., under date of September, 21, 1854.

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It contains a statement only of the indebtedness of Webb, and makes no allusion to the sale of the property, or of the release of dower by Mrs. Webb.

Exhibit C., under date of Jan. 6th, 1855, is a statement of the debts of the assignor and of the assigned property, as provided in the previous circular, and of the mortgages upon the estate, and adds: "Mrs. Webb still expresses her willingness to unite with me in making a perfect title, and relinquishing her right of dower, provided I am not interfered with in executing the trusts in the assignment." He adds, that in his previous circular, he had intended to sell the property in January, but had been advised to postpone the sale to February, as it was supposed it would then bring better prices.

I think there can be no misapprehension as to the meaning of this circular, so far as it respects Mrs. Webb. It was a proposition on her part and that of the assignee, that if the assigned estate was to be applied so far as she was concerned, to the payment of the sums provided for her in the assignment, she was willing to release, and agreed to release, her dower in the assigned estate. No one can doubt that such an intention, promulgated at the sale, would greatly enhance the price which it would otherwise bring, and thus greatly benefit the creditors. An incumbrance even to a small amount, presents a serious obstacle to a sale, and a title thus clouded, could not be forced upon a purchaser against his will.

In the response of the plaintiffs, exhibit E., under date of January 16th, 1855, they state that they are in favor of selling George Webb's property next month. Can there be a question that this is an acquiescence, at least, in favor of selling on the terms proposed? Those terms were for the benefit of the person to whom made; he replies, he is in favor of selling. Does he not, in substance and effect, say he is in favor of selling on the terms proposed; that he accepts the conditions named? I cannot but think that this is the true light to regard these propositions and replies. And it seems to me that this is confirmed by the stipulation by Exhibit G. under date of February 20th, 1855. This suit having been commenced, it

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was natural for the assignee to ascertain definitely whether the plaintiffs would come in under the assignment, or whether they intended to litigate it. Having in mind that the property was to be sold on the 27th of February, and that if the creditors would assent to Mrs. Webb receiving what was secured to her by the assignment, and the property be sold free of her dower, the plaintiffs stipulated to suspend all proceedings until the completion of the sale, and on their receiving their share of the proceeds of the sale, to discontinue this suit.

The property was sold free of Mrs. Webb's claim of dower. She executed and delivered a release of it, whereby this large estate was discharged of her claim. The creditors, and among others the plaintiffs, have put themselves in a position to be profited by this arrangement, and after she has parted with her rights beyond recall, they proceed to deprive her of the identical security which was the sole consideration of her action, avowed and known to all parties.

I am at a loss to see how this can be done, or how the aid of a court of equity can be invoked to set aside this arrangement. There is no allegation of fraud or overreaching. It was a natural and proper arrangement, greatly to the benefit, it seems to me, of the creditors of the estate, and I can see no ground upon which they can now change it.

The plaintiffs had full notice that Mrs. Webb had consented to release her dower in the assigned estate, and that it would be sold free from such claim, on the condition that she was to receive from the assignee the amount provided for her in the assignment. The property was so sold; she executed the release as agreed upon; and now, after all this is done, the plaintiffs seek to deprive her of this fund, and set aside the assignment, on the ground that no debt was due to her.

This I think they cannot do. So far as they are concerned, have they not admitted this debt as one due by the assignor to Mrs. Webb?

Whether they have or not, having lain by till after the sale, and the execution and release of her dower, I think they are now estopped from interposing any claim, or taking any steps

to deprive Mrs. Webb of the moneys secured to her by the assignment. This case is a much stronger one than that of *Brewster* agt. *Baker*, (16 *Barb.* 618.) There the plaintiffs claimed a canal boat as their property, which they alleged the defendant had converted to his own use.

The defendant purchased it of Mr. Thompson, who had possession of it, and sold it as his own. JOHNSON, Justice, in delivering the opinion of the court, says: "It is a well established principle, that when the owner of property stands by and sees another sell it as his own, to a *bona fide* purchaser, and makes no objection, and gives no notice of his rights, he will be held to have sanctioned the sale, and will not afterwards be permitted to assert his title as against such purchaser."

Numerous cases on the subject of estoppel may be cited to sustain this view of the case. They are familiar to the profession. A reference to a few of them will suffice. (*Wendell* agt. *Van Rensselaer*, 1 *Johns. Ch.* 344; *Storrs* agt. *Blarker*, 6 *Johns. Ch.* 166; *Town* agt. *Needham*, 3 *Paige*, 545; *Dougrey* agt. *Topping*, 4 *Paige*, 94; *Lowrey* agt. *Tew*, 3 *Barb. Ch. R.* 407.)

The case of *Dougrey* agt. *Topping*, (*supra*), is certainly a strong one, and it seems to me, controlling. The plaintiffs, by their silence at least, led Mrs. Webb to believe if she released her dower, she should receive the fund mentioned in the assignment. They, at least, are estopped from now attacking that fund, and their complaint in this cause, must be dismissed, with costs.

SUPERIOR COURT.

ALEXANDER B. JOHNSON, President, &c. agt. JAMES S. LYNCH, Impleaded with WILLIAM C. JOHNSON.

If the *attorney* in the suit can make an *affidavit of merits* for the defendant under certain circumstances, (which is conceded,) there is no good reason why an *agent* or *attorney in fact*, who is specially employed to defend the suit, may not make it.

In either case, the attorney or agent who makes the affidavit, must state an adequate *excuse* for its not being made by the party, as where the defendant is absent beyond seas, or is out of the state, which will usually be deemed sufficient.

The question then arises, whether the plaintiff can show by counter affidavits, that the excuse made in such affidavit of merits, is not entitled to credit? That is, can an affidavit of merits, in any respect, or in any particular, be contradicted?

Held, that the plaintiff is not precluded from presenting by affidavits such facts as tend to show that the *excuse* offered for the absence of the defendant's affidavit, is not to be received. The affidavit of merits in this case, was held insufficient on that ground, and the motion to set aside the inquest taken after the filing of the affidavit, was denied.

But the rule is well settled that no affidavits are permitted to be read which go to the point of controverting the *merits* which have been sworn to on the defendant's behalf, such as aim to show that the defence is unfounded, &c.

Oneida Special Term, November, 1857.

MOTION to set aside inquest at the circuit.

M. H. THROOP, *for defendants.*

A. BEARDSLEY, *for plaintiff.*

BACON, Justice. This cause was on the calendar of the last Oneida circuit upon a regular notice of trial and inquest, on the part of the plaintiff. On the morning of the second-day of the circuit, the plaintiff moved the cause, and proposed to take an inquest, to which the defendant's counsel objected, on the ground that an affidavit of merits had been duly filed and served the day preceding upon the plaintiff's attorneys.

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The plaintiff's counsel insisted that the affidavit was entirely insufficient, and submitted it to the inspection of the presiding justice, who on examination, deemed it insufficient to prevent the inquest, and allowed the plaintiff to take it at his peril.

The defendant now moves to set aside the inquest, and to reinstate the cause, on the ground that the affidavit was sufficient, and that it cannot be contradicted. The plaintiff's counsel resists the motion, insisting upon the insufficiency of the affidavit *per se*, and also presents affidavits which it is claimed, tend to show that it was not made in good faith, and that at the time it was sworn to, the defendant Lynch was actually in the county of Oneida, and in a condition where he could and should himself have made the affidavit. The affidavit which was presented to prevent the inquest, was made by one Perkins, and the purport of it is, that before the issue was joined in the action, the defendant Lynch left this state, and as the deponent believed, was absent therefrom when the affidavit was made, which by the jurat, appears to have been on the 19th of October; that the deponent, a few days before the issue was joined, met Lynch out of the state, and was requested by him to act as his agent in defending the suit, and deponent took charge of it accordingly; that Lynch stated the case fully and fairly to deponent, and he had himself made inquiries, and fully possessed himself of the facts in the case, and had stated them to counsel, and that the defendant had a good and substantial defence on the merits, as deponent was advised by counsel, and verily believed.

The first question is, whether this is such an affidavit of merits, or is sufficient within the rule to prevent an inquest. As a general rule, it is admitted that an affidavit of merits must be made by a party to the suit; but it is insisted that in certain exceptional cases it can be made by another person. Thus, on a motion for a commission, the agent in fact of the plaintiff, acting under a letter of attorney, may make the affidavit on which the motion is founded, without showing any excuse why the party himself has not made it. (1 *Cow.* 210, and 2 *John. Cas.* 69.) So where several suits are brought

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against the maker and indorsers of a note, the affidavit of merits may be made in all the cases by the maker of the note, the defence being the same in the cases, and he being acquainted with it. (6 Cow. 395.)

I have not been directed to any case in the books, nor am I able to find one, in which an affidavit like the one in this suit ever became the subject of question. But there have been cases where the affidavit has been made by the attorney of the party, and under certain qualifications, such affidavits have been held to be sufficient. Thus, in *Phillips agt. Blagge*, (3 John. Rep. 141,) the affidavit was made by the attorney, and stated that the defendant was absent beyond sea, and had represented to him that he had a good and substantial defence on the merits, and from his representations, and the papers produced, he verily believed there was a defence. The court held this sufficient and set aside the inquest. In *Stark weather agt. Caswell*, (1 Wend. 77,) the attorney of defendant swore to merits as informed by his client, and the circuit judge held it insufficient, and refused to permit the defendant's counsel to appear in the cause. For this reason the court set aside the inquest without passing upon the sufficiency of the affidavit. In *Rosevelt agt. Dale*, (2 Cow. 581,) the affidavit was made by the attorney, who swore to a good defence upon the merits, and that the defendant had left the city of New-York, for his residence in Columbia county, and did not return to the city in season to make the affidavit. The court decided it to be insufficient to prevent the inquest, and held such an affidavit to be inadmissible, unless a reasonable excuse is furnished for omitting the defendant's affidavit. The same rule was declared in *Mason agt. Bidleman*, (1 How. Spec. Term Rep. 62,) where in the affidavit no excuse was given why it was not made by the defendant. In view of these cases, I think it must be conceded that an affidavit of the attorney or a party will be sufficient where it swears to merits, and shows an adequate excuse for its not being made by the party; absence beyond seas or out of the state will usually be deemed sufficient. It is no valid objection to such an affidavit, that

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the knowledge of the defence is sworn to be derived from the statements of the defendant, for this is all the information, that as a general rule, the attorney can ever have. If, then, the attorney in the suit can make such an affidavit, I see not why an agent or attorney in fact, who is specially employed to defend the suit, may not make it, where he states not only, that he has been fully informed of the defence, but has himself made inquiries into the facts, and more fully become possessed of them by means of such inquiry, and states his belief that the defendant was then absent from the state.

Conceding this, is that the end of the matter, and can nothing be shown that tends to throw doubt or discredit upon the excuse which is made for the absence of the defendant's affidavit? The defendant's counsel insists that the affidavit can in no respect be contradicted, and he cites to support this proposition, the case of *Rosevelt agt. Kempen*, (2 *Cain*. 30,) where in a *nota bene* it is said, "the court seemed to intimate that counter affidavits of want of merits could not be received, as it would be trying the cause on affidavits," and *Phillips agt. Blagge*, (*cited supra*,) where the court also say that no counter affidavits can be read in such a case. The extent of the rule then, I apprehend, is, that no affidavits are permitted to be read which go to the point of controverting the merits which have been sworn to on the defendant's behalf. In this case, therefore, I do not take into consideration the affidavits of the Messrs. Johnson, which aim to show that the defence is unfounded. That question is not to be tried on affidavits. But I cannot admit that the plaintiff is precluded from presenting by affidavits such facts as tend to show that the excuse offered for the absence of the defendant's affidavit is false or frivolous, and that, therefore, a substituted affidavit is not to be received. The court has always deemed it important that the defendant should take the burden and responsibility of swearing to merits, and it is the plaintiff's right to insist that the party himself shall be put to the test, when the effect is to delay the speedy recovery of judgment. The affidavits on the part of the plaintiff on this motion, show

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affirmatively that the defendant Lynch was in the city of Utica on the evening of the 17th or 18th of October, (the latter day being on Sunday.) The attorney of defendant also admits that he saw his client on the evening of the 18th, and in his affidavit he states that he has no knowledge or belief that he was in the city of Utica at any time during the 19th of October, when an officer could be found at his office to administer an affidavit to him. The irresistible conclusion from this, I think, must be that the defendant was in the county of Oneida on some one of the three days above mentioned, and probably in some part of all of them. If he was, it will not answer to allow a substituted affidavit. If he was not visible at an hour when an affidavit could be taken, he could, at least, have been furnished with one which he could have sworn to elsewhere, and transmitted to his attorneys in time to have been used at the circuit. At any rate, there has been abundant time since the circuit, and before this motion was brought on, to supply a full and sufficient affidavit of merits; or at least to show by a frank disclosure of his whereabouts, that he has been nowhere within the state since the joining of the issue in this cause; or that he has been in such a position as would render it impracticable for him to supply the affidavit which the plaintiff had a right to require, if the defendant was in a condition to make it.

It may be that I err in holding that the plaintiff is at liberty to show these facts upon this motion, and that in no point whatsoever can the affidavit presented at the circuit be controverted; but it seems to me it is right to require this, and that it is important for the protection of the plaintiff in his just rights, and essential to prevent what might easily become, in the hands of unscrupulous parties, a fraud upon the practice of the courts.

The motion to set aside the inquest must be denied, but as the question is, so far as I know, a novel one, it will be without costs.

SUPREME COURT.

EDWARD J. TINKHAM agt. JOHN B. BORST.

The title to the rights of action against a corporation on its dissolution, as to the personal estate, passes either at common law to the people of the state, or under the statute, to a receiver appointed by the court to wind up its affairs.

A creditor of such corporation (in another state, with judgment and execution returned unsatisfied) cannot, therefore, sustain an action against such corporation, unless he shows, (in his complaint,) that the right of action does not pass to the people of the state under which it is incorporated, or to a receiver under its laws, or that the state cannot, or refuses to give relief, or that the receiver colludes with the defendants, or that no receiver can be appointed.

New-York Special Term, April, 1857.

DEMURRER to complaint. These facts are stated in the complaint, 2d count. The defendant was the owner of the whole capital of the American Exchange Bank of New-Jersey, amounting to \$50,000, except \$250, and that was held by several persons in trust for him. He fraudulently withdrew from the bank all the assets in its coffers, amounting to \$16,000, with a view to defraud the plaintiff and other creditors of the bank, and converted them to his own use. The state treasurer held securities to protect the bills of the bank; these were sold by him, and the proceeds all used in redeeming the bills. The plaintiff is the only present creditor of the bank; he had a claim against it, and obtained a judgment in New Jersey, and issued execution thereon, but it was returned unsatisfied. The business of the bank has been wound up, and the corporation dissolved, by the court of chancery of New Jersey, and it has now no legal existence. The stockholders of the bank, other than the defendant, are insolvent.

The third count *seems* intended to allege some of the same facts, and adds that the defendant has never paid his subscription.

H. H. BURLOCK, *for plaintiff.*

H. C. VAN VORST, *for defendant.*

Tinkham agt. Borst.

MITCHELL, Justice. It is plain that the omission to pay up the subscription, and the fraudulent abstraction of the funds of the bank, taking place while the bank was in existence, gave a cause of action to the bank, and to it alone, while it existed.

The complaint does not show what is the law of New-Jersey, as to the effect of a dissolution of a corporation. It must, therefore, be assumed to be as it is at common law, by which "on the civil death of a corporation, its *personal* estate in England vests in the king, and in our country in the people or state, as succeeding to this right and prerogative of the crown." (*Ang. & Ames on Corp.* 667; 2 *Kent Com.* 307.) The right of action against the defendant, then devolved on the state of New-Jersey, and the only remedy of the plaintiff was by petition to the state to have his just rights recognized, or to have leave to sue in the name of the state.

If, however, as we may infer, there is a special statutory provision in that state, authorizing the chancellor to appoint a receiver of an insolvent corporation, "with power to take into his possession all the goods and chattels, rights and credits, choses in action, &c., and property of every description belonging to the company at the time of its dissolution," (see *Hoyt agt. Thompson*, 1 *Selden*, 323, 324,) then the title passes to such receiver or remains in the state until the receiver is appointed. If the receiver is appointed, the title being in him, the plaintiff cannot sue, and so it is also if no receiver is appointed, as then the title remains in the state.

A corporation on its dissolution, is thus like a natural person on his death, the title to the rights of action of the latter does not pass to his creditors, or next of kin, but to his executors or administrators. There are cases in which a creditor or a next of kin, may sue the debtor of the deceased, as where the executor is colluding with the debtor, or is insolvent and not to be trusted with the fund; but then the executor is still to be made a party, and the action has the same effect as if he were plaintiff; so also, if one next of kin has alone a right to administer on the estate and *refuses to administer and prevents the other from administering*, and he is debtor to the estate, another

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of the next of kin may sustain an action against him. Such were *Long* agt. *Majestre administrator & Tardy*, (1 *J. C. R.* 305,) and *McDowl* agt. *Charles*, (8 *J. C. R.* 182.) Here there are no such special circumstances. It is not shown that the right of action does not pass to the state of New-Jersey, or to a receiver under its laws, or that the state cannot, or refuses to give relief, or that the receiver colludes with the defendant, or that no receiver can be appointed.

The demurrer to the 2d and 3d counts, must be sustained, and judgment be given on them, with costs, when final judgment shall be entered, unless the plaintiff elect to amend, and bring in the receiver with proper averments.

SUPREME COURT.

W. BARBON WILLIAMS, Receiver, &c. agt. FRANKLIN LAKEY
and others.

SAME agt. LYMAN BICKFORD.

SAME agt. SALLY FISH.

SAME agt. WILLIAM DOAN.

Every note taken and held by a *mutual insurance company*, must be deemed taken upon the conditions and terms of the act under which the company is organized. The reference in the note in these cases, to the charter and by-laws of the company, make this condition a part of the contract. But if not so expressed on the face of the note, the same construction would apply to it.

A member of such a company, therefore, is not liable to an action upon his deposit note, where he is not in default in paying any assessment made according to the terms of the act under which such note was given. (*See to the same effect, Hurlburt* agt. *Root*, 12 *How.* 511; *Hurlburt* agt. *Carter*, 21 *Barb.* 221; *Shaughnessy* agt. *The Rensselaer Ins. Co.*, *id.* 606; also *Thomas*, receiver agt. *Whalen*, *M.S. opinion*, 5th district general term, by Judge W. F. ALLEN.)

An *ex parte* order of the court, obtained by the plaintiff as receiver of such insurance company, directing him to sue for the *whole unpaid balance* on these notes, does not help the difficulty, or vary the case at all. The court cannot change

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the terms of the contract of the defendants. All there is about that would seem to be that such an order was inconsiderately granted.

Neither does the *insolvency* of such company, and the process of winding up its affairs by a receiver, change the liability of a member thereof upon his note. The charter, the by-laws, and the terms of the contract, all upon their face, show that full payment of the note was not intended by the parties except as a penalty for the non-payment of an assessment.

The Revised Statutes relating to the dissolution of corporations, and the proceedings against them in equity, apply only to *stock* corporations, not to mutual insurance companies who have no stockholders, strictly speaking, the liabilities of its members being fixed by their contract.

Monroe Special Term, May, 1857.

DEMURRER to complaint. The action was upon premium notes. The complaint set out the notes and an order directing the receiver to sue for the whole premium notes of the company. Defendants demurred to the complaint.

S. K. WILLIAMS, *for plaintiff, in 1st, 3d and 4th causes.*

J. M. & H. T. HATCH, *for plaintiff in 2d cause.*

ALDRICH & HARRISON, *for defendants, in 1st and 2d cause.*

W. S. STOW, *for defendant in 3d cause.*

P. PEDDER, *for defendant in 4th cause.*

E. DARWIN SMITH, Justice. The complaint in each of these cases, sets up a note payable "in such portions and at such time or times as the directors of said company may agreeably to their charter and by-laws require." The complaint in each case also states, that the plaintiff as receiver, &c., was by an order of this court made at special term, at Batavia, June 14th, 1856, ordered and directed to sue for and collect the whole unpaid balance of the said premiums, as required for the payment of the losses and expenses of the company.

To these complaints there are demurrers for that they do not severally state facts sufficient to constitute a cause of action. The company of which the plaintiff is receiver, was organized June 18th, 1850, under the general act of 1849. Under this act, no provision is made in respect to assessments, but the act of 1853, (§ 20,) applies all its provisions to companies organized

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under the act of 1849, (except that their capital may continue of the amount named in their respective charters,) and provided that every person effecting insurance in any mutual company, shall be bound to pay for losses and such necessary expenses accruing in and to said company, in proportion to the amount of his deposit notes. And it also provides, (§ 13,) that the directors after receiving notice of any loss or damage by fire, and ascertaining the same, shall settle and determine the same to be paid by the several members, as their respective portions of such loss, and the sum thus to be paid by each member, shall always be in proportion to the original amount of his deposit note, and shall be paid within thirty days after notice and personal demand, and in case of neglect to pay within that time, then the directors may sue for and recover the whole deposit note, with costs of suit, &c. Every note taken and held by a mutual insurance company, must be deemed taken upon the conditions and terms of the act under which the company is organized. The reference in the note in these cases to the charter and by-laws of the company, makes this condition part of the contract; but if it were not so expressed on the face of the note, the same construction would apply to it. The liability, therefore, of each member to make payment, depends upon this express or implied condition of his contract. He is liable to pay his due proportion of all losses, and is liable to be sued and compelled to pay the whole amount of his deposit note, if he neglects to do so, for thirty days after notice of "the sum to be paid by him," and personal demand. It was held by my brother STRONG, in *Hurlburt agt. Root*, (12 *Howard*, 511,) under this act of 1849, that an assessment must be made under the provisions of the act of 1853, for losses, &c., before a member would be liable to an action on his deposit note. This decision was affirmed at general term, in September last. The same decision made by this court, Judge JOHNSON, giving the opinion, in *Hurlburt agt. Carter*, (21 *Barb.* 221,) and by Judge HARRIS, in *Shaughnessy agt. The Rensselaer Insurance Co.*, (same volume of *Barbour*, 606.) The same point, too, has recently been decided in the same way, by the general

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term of the 5th district, in the case of *Thomas, receiver agt. Whalen*, as per opinion of Judge ALLEN, recently published. Upon these authorities, the complaints in these cases, cannot be sustained. The fact that the plaintiff had obtained an *ex parte* order directing him to sue for the whole unpaid balance on these notes, cannot vary the case. The court could not change the terms of the contracts of the defendants, and the order in question, was doubtless inconsiderately granted, as too many orders in these cases have been, by all the judges, when an application is made *ex parte*, and the judge does not, as is very rarely the case, see or approve of the terms of the order. This order, at least, was granted upon a mistaken view of the law, and can be of no avail to the plaintiff, in maintaining these suits. But it is supposed that this view of the acts under which these companies are organized, and of their by-laws, do not apply after the insolvency of the corporation, and were only designed to govern the proceedings of the company and its relations to its members, while it was in full operation.

This argument is based upon the provisions of the Revised Statutes relating to the dissolution of corporations and the proceedings against them in equity. Section 69 of chapter 8, part 3, article 3, is supposed to furnish authority for the receiver to sue for the whole note in these cases. That section authorizes a receiver, if there shall be any sum remaining due upon any share of stock subscribed to any such corporation, to proceed and recover the same by suit, &c. This section only applies to stock corporations. In the mutual insurance companies there are no stockholders, strictly speaking. The notes given on the taking of a policy of insurance are not like the subscriptions to the capital stock of a joint stock corporation. Such subscription is an absolute engagement to pay towards the capital stock, the full amount subscribed. Where a receiver, under said section 69, calls for payment of the balance of an unpaid subscription, he merely requires the delinquent stockholder to fulfil his obligation. In making payment of such balance the stockholder merely performs his contract. Not so with the maker of a note given to a mutual insurance

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company. The charter, the by-laws and the terms of the contract, all upon their face, show that full payment of the note was not intended by the parties, except as a penalty for the non-payment of an assessment. To require full payment after the insolvency of the corporation, without respect to the amount of the losses or debts of the company, is to require something beyond the terms, force and intent of the contract. The court cannot alter a man's contract, or make him pay more or sooner than he has agreed to do, or in a different manner. The fact of the insolvency of the corporation, in short, cannot vary the contracts of a member of a mutual insurance company. His liability is fixed by his contract. It is conditional to pay only in just proportions with the other members liable to contribute to a common loss, and cannot be enlarged. There must be judgment for the defendants in all the cases upon the demurrers.

SUPREME COURT.

The People *ex rel.* WM. H. BURROUGHS agt. JAMES C. WILLET, Sheriff.

An action on the custom against an innkeeper for the loss of the baggage of his guests, is founded on *tert.*

It is not for injuring or for wrongfully taking, detaining or converting personal property, but the gist of the action is the negligence in keeping the property.

In such an action, a defendant may be held to bail under the Code, (§ 179, *Subd.* 1,) when he "is not a resident of the state, or is about to remove therefrom," it being "a cause of action not arising on contract." When he has not been arrested before judgment, an execution cannot properly be issued against his body (*Code*, § 288) on the judgment without an order of the court.

Such a judgment does not show a case for arrest, inasmuch as it does not show the non-residence of the defendant, or his intent to depart from the state.

The regularity and propriety of such an arrest may be inquired into on *habeas corpus* (2 R. S. 568, § 41, *Subd.* 4 and 6.) *Bank of U. S. agt. Jenkins*, (18 J. R. page 305,) examined.

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A defendant so imprisoned may be discharged on *habeas corpus*, if it appear that the process on which he is detained (1) "has been issued in a case not allowed by law, (2 *R. S.* 568, § 41, *Subd.* 4,) or, (2), "where the process is not authorized by any judgment order or decree of any court, nor by any provision of law." (*Ibid.*)

New - York Special Term, September, 1857.

THE facts sufficiently appear in the opinion which was rendered a few days before Judge PEABODY left the bench.

JOHN E. BURRILL, *for relator.*

CHARLES TRACY, *for defendant.*

PEABODY, Justice. Motion for discharge of the relator on *habeas corpus*.

He is detained by virtue of an execution against his body issued on a final judgment against him. The judgment was recovered for the value of a travelling bag and contents, deposited with him for safe keeping, as innkeeper of the Irving House, in this city, the plaintiff therein being a guest at said house. The action was brought upon the custom of this state, which is alleged to be, that the innkeepers are bound to keep safely such property for their guests. The breach alleged for which the judgment is recovered is, that "defendant did not keep said bag and contents safely and without diminution, but on the contrary, he and his servants so negligently and carelessly behaved and conducted, that said bag and contents were by mere carelessness of defendant and his servants, carried away by some person unknown, and were wholly lost to plaintiff."

On this judgment an execution against the body of defendant was issued, on which he is now in custody. The question on which the legality of the imprisonment depends is, whether the execution against his body was authorized by the judgment. But there is a preliminary question here, viz: whether the regularity or propriety of that process can be inquired into in this proceeding on *habeas corpus*. Section 22, subd. 2, of the *habeas corpus* act, (2 *R. S.* 563,) provides that

persons detained by virtue of the final judgment of any competent tribunal, or of any execution issued on such judgment or decree, are not entitled to prosecute the writ. It is said that the relator comes within this class, and, therefore, cannot prosecute this writ. Whether he is held by virtue of an execution on a final judgment of a competent tribunal, is the question raised by the preliminary objection, and the question on the merits is very much the same. The mere claim that he is so held should not, I think, conclude me. There is a case, however, in 18 *John's Rep.* p. 305, (*Bank of U. S. agt. Jenkins*), which seems to indicate that a writ of *habeas corpus* is not the proper remedy for a person detained in this manner, and that is the principal authority on the subject. There is a difference in the cases, however. In that case, as in this, the principal question was, whether the *capias ad satisfaciendum* was regularly issued. There the objection to the regularity was, that the foundation for it had not been laid by a previous execution against the property to the proper county. Here the objection is, that it is not warranted by the judgment in its own nature. In those days, an execution upon a judgment was issued by the court, theoretically at least. It had to be sealed and signed by the clerk. Now, it is not even in theory issued by the court, but by the party or his attorney. That case, moreover, seems to have been but little considered. The court before whom it was brought had just denied the same relief on motion in the suit, or rather had granted it on terms which the applicant would not accept, and although the court said unconditionally, the writ was not the proper remedy, they did, nevertheless, on the same motion, direct the order previously made to be modified so as to give all the relief sought. It was, therefore, an election of the court in which way it would give the relief, perhaps, or a refusal to review on this writ a decision just made in a different proceeding, rather than an adjudication against the propriety of the writ which should be deemed an authority that it is not a proper remedy in such a case. The relief asked was granted, but was credited to the account of a motion previously made and decided,

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rather than to that of the writ itself, although that was the only proceeding before the court at the time. Moreover, that case was before the Revised Statutes, under an act of 1813, not entirely similar to the present act. I am not inclined, under all the circumstances of that case, to defer to it as a controlling authority, but I shall examine to see whether the relator is detained by virtue of an execution upon a judgment of a competent tribunal. I am more ready to adopt this course because I find in § 41 of the same act, (2 R. S. 568,) that a person may be discharged on this writ from custody by virtue of civil process from a court legally constituted (*Subd. 4.*) when the process, though in proper form, has been issued in a case not allowed by law: (*Subd. 6.*) "when the process is not authorized by any judgment, &c., of any court, or any provision of law." Whether process which is set up as a justification for detention, has been issued in a case allowed by law, and whether it is authorized by any judgment of a court; therefore, I am authorized by those provisions of the statute to inquire, and a decision of these questions, is all that will be necessary to dispose of the matter before me.

The judgment and execution are before me, and the remaining question is, whether, on the whole, this execution on such a judgment is authorized in law. The suit was brought to recover the value of certain articles, on the ground that the defendant was bound by the custom of this state to receive and safely keep the property of his guests, and that having received that of the plaintiff he kept it so negligently that it was lost. This custom of the realm would seem in the absence of express contract to take the place of it, and an action for not preserving the property according to it would seem to be in the nature of an action for breach of contract. But on a more careful consideration, the grounds of the action appear to be not the failure to keep safely and restore the property, which would probably be only a breach of implied contract, but the negligent, careless and improper behavior and conduct of the defendant, the wrongful (tortious) conduct of defendant and his agents, (negative perhaps, to be sure, but nevertheless

wrongful and tortious,) by which the property was lost to the plaintiff. This negligent, careless, and therefore wrongful and tortious conduct, rather than the failure to fulfil the contract, is the ground of the action.

(See *Burkle agt. Ellis and al.*, 4 *How. Pr. R.* 288; *The Bank of Orange Co. agt. Brown and others*, 3 *Wend.* 158; *Bretherton agt. Wood*, 3 *Brod. and Bing.* 54; 2 *Lord Raymond*, 909; 2 *Ct. Pl.* 155 and 320; *Hallenbaek agt. Fish*, 3 *Wend.* 547; 4 *do.* 618.)

In the cases above cited, it is settled that an action on the custom is founded on the tort or misfeasance, and not on the contract, express or implied, which often attends the transaction, and is in many of the cases given in evidence. It is often difficult to determine whether the action is on the contract or on the custom, and the confusion in the cases, seems to have arisen from the difficulty in ascertaining which constituted the basis of the action, the custom or the contract, rather than whether an action ascertained to be on the custom was founded on tort or on contract. (3 *Wend.* 168.)

The suit against Burroughs being the custom, was founded on tort; the judgment record shows this fact. With this fact apparent, was the execution properly issued against the body of defendant? Under the non-imprisonment act, (*Laws of 1831, p. 396*), by which this question would have been controlled, prior to the Code, he would have been liable to arrest, for, under that a defendant in an action in tort could be held to bail. (*Burkle agt. Ellis*, 4 *How. Pr. R.* 288.) But by the Code, which now embraces the law on the subject, the only provision under which there is any pretence for the claim is contained in section 179, subdivision 1, which authorizes the arrest of a party, "In an action * * * * * on a cause of action not arising out of contract, where the defendant is not a resident of the state, or is about to remove therefrom, or where the action is for an injury to person or character, or for injuring or wrongfully taking, detaining or converting property." It does not appear that the defendant is not a resident of this state, or being so, is about to remove therefrom, nor does it ap-

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pear that the action is for an injury to person or character, or for wrongfully taking, detaining or converting property, and it only remains to be considered whether it is for injuring property. On this subject the decision of the superior court in *Tracy agt. Leland*, (2 *Sandf. S. C. R.* 729,) which has not, that I am aware, been overruled, seems to relieve us of all doubts, and leads to the conclusion that this is not an action for an injury to property. The relator was not liable to arrest by the judgment as entered at any rate, without an order from a judge, and whether it was a proper case for an order cannot be decided here, for the facts do not appear. He certainly was not, in the view I have taken of the case, unless some other fact, such as non-residence or an intent to remove from the state, be superadded to all that appears in the judgment record before me. He could not, therefore, have been arrested on the facts shown to me under sections 179 and 181, before judgment, and it follows from section 288, that he was not properly arrested on the judgment obtained in that suit, and he, therefore, must be discharged.

My conclusions are :

First.—That in this writ of *habeas corpus*, I am authorized to inquire,

1. (2 *R. S.* 568, § 48, *subdivision* 4.) Whether the process though proper in form, is allowed by law, in this case ; and,

2. (*Ibid*, *subdivision* 6.) Whether the process is authorized by a judgment, order or decree of a court, or by a provision of law.

Second.—That an action on the custom against an innkeeper or common carrier, is founded in tort or misfeasance, and not on contract.

Third.—That in such an action, a defendant cannot properly be held to bail, except, under section 179, by order of a judge, on proof, *in addition to the facts constituting the cause of action*, that defendant is a non-resident of the state, or is about to remove therefrom.

Fourth.—That as the record of judgment in such a case does

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not show all the facts necessary to authorize an arrest in the suit before judgment, execution against the body cannot properly be issued on it, at least without the order of a judge, and on proof of the additional facts required to entitle the plaintiff to it.

SUPREME COURT.

EDMUND HAYNES and others agt. ALLEN MOSHER.

The requisites of an affidavit on taxation of costs, to support the charges for the travel and attendance of witnesses, are well stated by Mr. Justice BALOOM, in *Wheeler agt. Lozee*, (12 How. 446.) It should appear that each of the witnesses, for whom fees are claimed, was a material and necessary witness for the party upon the trial of the action; that each actually attended the court as such witness the number of days specified, and actually travelled the number of miles specified, for the purpose of attending as such witness in the action, and in returning from the trial.

Where it appears that witnesses were not sworn on the trial, that fact furnishes presumptive evidence that they were not necessary. Before the party can be allowed for the travel of such witnesses, it is incumbent on him to overcome this presumption by showing how it happened, if they were material and necessary witnesses for him, that he was able to dispense with their testimony on the trial.

It is the duty of the taxing officer to see that the prevailing party recovers no more for the expenses of witnesses, than he has himself actually and in good faith incurred. The object of the law is *reimbursement*, not profit.

In an action to recover the possession of lands, the *surveyor's fees* in procuring the boundaries of the land, is not a *disbursement* in the action, which the prevailing party has a right to charge in his costs. It is only when the survey is a part of the proceedings in the action, as in the case of partition or admeasurement of dower, that the surveyor's fees are taxable as disbursements.

Albany Special Term, June, 1857.

MOTION for retaxation of costs.

THE action was brought to recover the possession of lands. It was tried upon an issue of fact, at the Rensselaer circuit, in June, 1857. The trial resulted in a verdict for the defendant.

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Upon the taxation of the costs, the defendant was allowed for the attendance of *nineteen* witnesses. The aggregate number of days allowed was 106, and the whole number of miles allowed for the travel of the witnesses was 668. The defendant was also allowed \$48, for surveyor's fees. These charges having been duly objected to on the taxation, the plaintiffs moved for a retaxation.

JOHN J. VIELE, *for plaintiffs.*

MARTIN I. TOWNSEND, *for defendant.*

HARRIS, Justice. The motion for a retaxation of the costs, must be granted. The affidavits in support of the charges for the travel and attendance of witnesses, are entirely insufficient to justify the allowance of such charges. The requisites of the affidavit in such cases are well stated by Mr. Justice BALCOM, in *Wheeler agt. Lozee*, (12 *How.* 446.) (*See also Logan agt. Thomas*, 11 *How.* 160.) It should appear that each of the witnesses, for whom the party entitled to costs claims to be allowed, was a material and necessary witness for the party upon the trial of the action, that each witness actually attended the court as such witness the number of days specified, and actually travelled the number of miles specified, for the purpose of attending as such witness in the action, and in returning from the trial. It was shown in this case, in opposition to the allowance, that a large number of the witnesses were not sworn upon the trial. This fact furnishes presumptive evidence that the witnesses were not necessary. Before the defendant could be allowed for the travel and attendance of such witnesses, it was incumbent on him to overcome this presumption, by showing how it happened, if they were material and necessary witnesses for him, that he was able to dispense with their testimony on the trial. (*See Dean agt. Williams*, 6 *Hill*, 376.) In all such cases, it is the duty of the taxing officer to see that the prevailing party recovers no more for the expenses of witnesses than he has himself actually and in good faith incurred. The object of the law is *reimbursement*, not profit. There

should be no more allowed for witnesses' fees than the party in whose favor the allowance is made, has actually paid or rendered himself liable to pay to procure testimony which he deemed material and necessary. This should be the criterion by which, in all cases, the officer should be governed. He should be satisfied, and that too by legal evidence, that the party applying to have witnesses' fees allowed, has himself actually incurred the amount he claims. Nothing short of the proof to which I have referred, can properly be deemed sufficient.

The charge for surveyor's fees was improperly allowed. The party incurred the expense for his own benefit. He had the surveys made in order that he might know his rights and be prepared to protect them. Such surveys may have been made before or after the suit was commenced. In either case, the expense was not a disbursement in the action. In most actions relating to the boundary of lands, the parties employ surveyors and avail themselves of their testimony. But the amount paid them for their services, is no more a disbursement in the cause, than the amount paid to counsel for their services. It is only when the survey is a part of the proceedings in the action, as in the case of partition or admeasurement of dower, that the surveyor's fees are taxable as disbursements. The taxation must be set aside, and the costs retaxed upon the usual notice.

SUPREME COURT.

JOHN TREADWELL's executors agt. ALFRED ABRAMS.

Where in an action upon a promissory note, the defendant set up a counter claim for many years' services rendered the plaintiff's testator, (the payee of the note,) previous to the date of the note, and that the testator had promised to give defendant in consideration thereof, certain real estate of large valuation, which counter claim was attempted to be proved on the trial, although a payment upon the note had been made by the defendant, as late as six weeks before the testator's death.

Held, that the circuit judge was correct in charging the jury, that all the alleged services, if any, having been rendered before the date of the note, and it not being shown for what the note was given, the jury had a right to presume, in connection with the subsequent payment, that the note was a *settlement of all existing claims* between the parties.

New-York Special Term, March, 1857.

JOHN W. EDMONDS, *for plaintiffs.*

JAMES W. GERARD, *for defendant.*

ROOSEVELT, Justice. The defendant admits the claim of the plaintiff for \$200, as the balance due on a promissory note made by him on the 28th April, 1851; but sets up a counter claim for alleged services of a prior date, to the amount of ten thousand dollars. On the trial, the judge charged, and the jury found against him; and the question now raised is, and it is in reality the only question, was the charge right? I am thus again called upon, as a single judge, to review the decision of another single judge, both of the same court, and both with the same powers. The unfitness of the procedure is too manifest for argument. Fortunately I see no reason for any diversity of opinion, as to the merits on the case as presented.

Chronology, it is said, is one of the eyes of history. Applied to the defendant's claim, it leaves no room for doubt.

The defendant says that John Treadwell, the payee of the

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note, (who died on the 5th of December, 1851,) in his lifetime, employed the defendant, he does not say at what, for the space of seven or eight years. During the five years from 1843 to 1848, he was employed "for the greater part of the time, but not steadily," whenever the deceased required his services, which was, he says, with some apparent contradiction, during "about one quarter of the time." He then worked continuously for six months till March, 1849. And beginning again in September, continued steadily for nineteen months and a half, "till the 17th of April, 1851:" when "his work, labor and services," whatever they were, appear to have ceased.

What was to be his salary, or perhaps, more properly speaking, his wages, is very uncertain. No price, he says, was agreed on; certainly none was paid. But in lieu of it, Treadwell, he says, who was a wealthy man, promised to leave him "a large portion of his property." Unfortunately, however, the testator "died very suddenly and unexpectedly," and was thus, we are to infer, defeated in his liberal intentions. He had time enough, nevertheless, it would seem, verbally to renew his previous engagement, for "he promised to give the defendant, for his services, a certain property in Flatbush, called the Johnson Place, then owned by him, and of the value of about ten thousand dollars."

Such is in substance, the defendant's counter claim as presented by himself. It exhibits in its dates, when brought together and compared, this striking, and certainly not very usual, phenomenon, of a liberal man, who acknowledged himself, in effect, to be another's debtor, to the extent of \$10,000 for many years' services, completed only ten days before, exacting (and the other freely giving) a written engagement promising on demand to pay that other five hundred dollars, and that, too, with interest, *for value received*. How is it possible that such an acknowledgment, unexplained, should have been given or demanded, if there existed at the time a known and admitted debt in favor of the maker, and against the payee, of twenty times the amount? And still further, how is it possible that the acknowledgment should not only have

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been demanded and given, but part payment afterwards exacted and complied with, as late as six weeks only before the testator's death?

Without going over the evidence in detail, it seems to me that the judge who tried the cause, could do no less, under the circumstances, than to say to the jury, as he did, that all the alleged services, if any, having been rendered before the date of the note, and it not being shown for what the note was given, they had a right—he did not say they were bound—to presume, in connection with the subsequent payment, that the note was a settlement of all existing claims between the parties. Such a charge was not only warranted by law, but cautious and guarded. The exception, therefore, on that point (and it is the only one, as already observed, of any consequence,) was not well taken.[1]

Motion for new trial denied, and judgment for plaintiff for the balance of the note, with interest and costs, according to the verdict of the jury.

[1] The cases of *De Forest agt. Bloomingdale*, and of *Lake agt. Tyson* (the last in the court of appeals) are conclusive. (See 5 *Denio*, 304, and 2 *Selden*, 461.)

SUPREME COURT.

ANDREW HUNTER, receiver, &c., appellant agt. PHILIP J. POWELL, supervisor &c., respondent.

A cause of action in *torit*, cannot be united with one on *implied contract*. For instance, what was formerly *assumpsit*, cannot be united with *case* for wilful negligence or malfeasance.

In this case, the second count of the complaint was stricken out on motion, (§160.) as irrelevant, hypothetical, argumentative and uncertain.

Plattsburgh General Term, September, 1857.

C. L. ALLEN, JAMES and ROSEKRANS, Justices.

Hunter agt. Powell.

THIS is an appeal from an order of special term, striking out of the complaint the last statement or second count of the cause of action. That pleading avers, that on the 10th of January, 1857, the county judge of Saratoga county, made an order in an action in the supreme court, wherein Minor Montgomery was plaintiff, and Charles C. Nelson, defendant, of proceedings supplementary to the execution, directing that the demands or claims which said Nelson had against the town of Stillwater, (which was the sum of \$132.04,) be applied towards the payment of the said Montgomery's judgment, against said Nelson, and did further order that plaintiff be appointed receiver of all the debts, property and equities, and rights of action of the said Nelson. That the plaintiff having performed all things and conditions required, on the 11th of January, 1857, took upon himself the duties of receiver, and gave due notice of his appointment and of the order of the county judge to the defendant. That the defendant afterwards, and on or about the 1st day of February following, received from the collector of the town of Stillwater, the said sum of \$132.04, collected to pay the said demand, and has refused to pay the same to the said plaintiff, although often requested, &c. The complaint then proceeds as follows: "*Or* by way of a second count or charge, the plaintiff avers that if the said defendant as such supervisor as aforesaid, did not receive of the said collector the sum of money above mentioned, it was because some arrangement or order, or directions of the defendant, made with or given the said collector to misapply the said money so collected by the said collector to apply on the said demand or claim, due said Nelson, and directed by the said judge as aforesaid to apply on said judgment, after due notice had been given to the defendant of the said order and directions of the said judge. Wherefore, the plaintiff demands judgment from defendant as supervisor of the town of Stillwater, &c., for the amount of said \$132.04, and interest." It is this matter that the judge ordered to be stricken from the complaint, and the plaintiff appeals from the order.

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Z. A. LELAND, *for plaintiff.*J. W. CULVER, *for defendant.*

By the court—C. L. ALLEN, Justice. The second count of the complaint, sets out no specific cause of action. If it be considered as a part of the first, it is then hypothetical and inconsistent, and attempts to unite two separate and distinct causes of action in the same count, which cannot be done. The whole statement is indefinite, irrelevant, hypothetical, argumentative, and uncertain, and was properly stricken out under section 160. It attempts to unite a cause of action in tort, with an action on implied contract, which cannot be done under section 167. (*See 6 How. 145, 470, 8 Id. 470.*) The defendant might have perhaps demurred to this count, but I think he had his remedy also by motion. The order of special term should be affirmed with \$10 costs and disbursements, but plaintiff should have leave to amend on payment of the costs below and of this appeal, within twenty days.

The court below suggested in its opinion that the causes of action attempted to be set up in the first and second counts, might be united under the first subdivision of section 167, as they arose out of the same transaction or same subject matter. But that subdivision does not apply to different causes of action, such as uniting what was formerly assumpsit, with case for wilful negligence or malfeasance, such as are attempted to be united here. The causes of action must all belong to the same class. (2 *Code Rep.* 165; 1 *Whit. Pr.* 723. 4, &c.)

SUPREME COURT.

GEORGE T. JACKSON agt. CÆSAR H. S. FIGANIERE.

Under § 309 of the Code, a *per centage* may be allowed on the entry of judgment for the issuing of an attachment, although no property has been attached.

New-York Special Term, February, 1858.

THIS was a motion by way of appeal from the adjustment of the costs by the county clerk, who had allowed upon the entry of judgment, a *per centage* for the issuing of an attachment, although no property had been attached, holding that by the wording of § 309 of the Code of Procedure, the *per centage* was to be computed upon the amount "claimed or attached." The motion was made to reduce the costs as adjusted, by striking out the item of allowance.

ROBERT B. ROOSEVELT, *for the plaintiff.*

CHARLES N. BLACK, *for the defendant.*

DAVIES, Justice—Held, that the sections of the Code concerning costs, should be liberally construed, and that under the wording and intent of § 309, the *per centage* was allowable, and was properly inserted in the judgment.

Motion denied, without costs.

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SUPREME COURT.

The People *ex rel.* W. BARRON WILLIAMS agt. THE BOARD
OF SUPERVISORS OF MONROE COUNTY.

The fee bill in the Revised Statutes, and in the session laws of 1840, must be deemed repealed by the Code, so far as the same relate to the *clerks of courts*. The clerk's fee of *one dollar*, on every trial, provided by the Code, was obviously intended to pay the clerk for the ordinary miscellaneous services required of him in the progress of the cause, as well as the services rendered in court on the trial, and must embrace the service of *putting the cause on the calendar*, as prescribed by the old fee bill, and the practice of the courts.

The fee of putting a cause on the calendar was never a *county charge*. It was a service rendered in a civil action, and was always claimed and paid for as such. The Code imposes no new duty upon the clerk in this particular.

But the rules of the court (*Rule 34*) require the clerk to *print* the calendar for the general term. This expense is clearly a *county charge*.

Monroe Special Term, May, 1857.

MOTION to quash writ of mandamus, and demurrer to return to writ, heard together.

The relator had been clerk of Monroe county, and had sued out and obtained an alternative mandamus, requiring the defendants to audit and allow his claim for making up circuit calendars for three years. The defendants had put in an answer to the writ, to which the relator demurred. The defendants moved to quash the writ, and this motion, and argument on the demurrer came on together, presenting the single question whether the making up of court calendars by the clerk, was a county charge.

O. H. PALMER, *for the relator.*

M. G. WARNER, *for defendants.*

E. DARWIN SMITH, Justice. In the fee bill of the Revised Statutes, clerks of the supreme court, county clerks and other clerks of courts, were allowed for entering every cause

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on a calendar for the court, and making a copy thereof for the use of the bar, a fee of twelve and a half cents. This fee was chargeable to the attorney or party requesting the service. In the revised fee bill of 1840, this fee was increased to 25 cents, and so remained till the time of the Code. The Code gives the clerk a fee of one dollar on every trial; for filing a transcript, 6 cents, and entering a judgment 50 cents, and declares that "he shall receive no other fee, for any service whatever, in a civil action, except for copies of papers, at the rate of five cents for every 100 words." This is, undoubtedly, a substitute for the fee bill of 1840, and of the Revised Statutes so far as the latter was in force at the time of the Code, and taken in connection with section 468 of the Code, must be deemed to repeal those fee bills, so far as the same relate to the clerks of courts. This fee of \$1, was obviously intended to pay the clerk for the ordinary miscellaneous services required of him, in the progress of the cause, as well as the services rendered in court on the trial, and must, I think, clearly embrace the service of putting the cause on the calendar, as prescribed by the old fee bill and the practice of the courts. The fee for putting a cause on the calendar was never a county charge; it was a service rendered in a civil action, and was always claimed and paid for as such. The Code imposes no new duty upon the clerk in this particular. But the rules of this court (*Rule 34*) require the clerk to print the calendar for the general terms. This is an expense which is clearly a county charge. It is an expense incurred by a county officer in executing the duties of his office, in a case where no specific compensation for such service is provided by law, and comes within subdivision 9, of section 3, title 4, chapter 12, part 1st, of the Revised Statutes. But this suit was not brought to enforce payment of this expense, nor does it appear that the supervisors have refused to pay the same. There must, therefore, be judgment on the demurrer in favor of the defendants, and the writ must be quashed with \$10 costs, to abide the event.

Atwill agt. Le Roy and others.

SUPREME COURT.

ATWILL agt. LE ROY and others.

Where the complaint counted upon the cause of action as upon *contract*, (the summons being issued in that form,) but stated *false representations* to anticipate the defendants' answer that they had fulfilled their contract with the plaintiff, by delivering him the stock which he was to receive under his contract (for work done.)

Held, that the plaintiff had thereby admitted that the contract had been strictly complied with by the defendants, but that the mode of payment did not bind the plaintiff on account of the alleged fraud. The action was, therefore, for the *fraud*, and was improperly brought on contract. (*See Doedt, &c., agt. Wiswall, &c., ante, p. 128.*)

New-York Special Term, March, 1857.

DEMURRER to complaint.

MITCHELL, Justice. The defendants objecting that there is a misjoinder of causes of action, viz: one in tort and one in contract, the plaintiff answers that the complaint is on contract only, and that the false representations are stated to anticipate the defendants' answer that they had fulfilled their contract, by delivering him the stock which he was to receive under his contract.

This admits that the contract has been strictly complied with, but that the mode of payment does not bind the plaintiff on account of the fraud. The action, therefore, is for the fraud, in representing that the stock was valuable, which was known not to be valuable, and should be for the damages thus sustained. Instead of that, the summons as on a *contract* for the recovery of money only, is for payment of a specific sum, and not "for the relief demanded in the complaint," and the complaint demands the specific sum and not damages. As these defects are not grounds of demurrer, the defendants cannot avail themselves of them in this way.

The defendants object that the representations were made to

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the plaintiff and his co-contractor, and that an action for tort cannot be assigned. (*Zabriskie agt. Smith*, 3 Kern. 322, by DENIO, J.) But the complaint shows no cause of action for the tort in the co-contractor, as it alleges that *shortly* after the making of the contract, White, the co-contractor, assigned his interest therein to the plaintiff, and that *after* the assignment, the plaintiff did actually perform the work. If this be so, White suffered no loss, as he did no work, and although the false representation was to the two, the whole injury was to the plaintiff alone, and he alone had a cause of action.

The complaint is not so certain in this respect as it should be, but that is not a cause of demurrer.

The demurrer must be overruled with costs of the argument, with leave to the defendants to answer, and leave to the plaintiff to amend his summons and complaint, as to the relief sought, and in other particulars, and leave to the defendants to move that plaintiff be required to make his complaint more definite and certain, and to conform his summons and prayer of relief to the facts in his complaint, or the statement in the complaint to the relief sought in the summons.

SUPREME COURT

JOHN P. BEEKMAN, administrator of WILLIAM BARTHROP,
deceased agt. WILLIAM KIRK.

Judgment on confession was made by defendant for \$4,165.40, and the *statement* of indebtedness given on this wise: "The indebtedness arose on a judgment in the supreme court of the state of New-York, in favor of Edward Bain, Lucas Hoes and William Bain, against William Kirk and Joseph J. Bullis, and assigned to said plaintiff, and also on a bond, executed by William Kirk and Joseph J. Bullis, to the said William Barthrop in his lifetime, dated the 22d day of May, 1838, for the sum of \$2,000; both of which securities were given for money borrowed by the defendant; and that the sum confessed was justly due to the plaintiff without any fraud whatever."

Held, insufficient. As to the judgment first mentioned in the statement, what was

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the amount of the loan or for what sum, or when the judgment was recovered, or whether anything remained due upon it, does not appear.

The statement in respect to the other ground of indebtedness is less defective, but is insufficient; it is not stated what amount remained due upon the bond.

The general *assignee* (for the benefit of creditors) of a judgment debtor, has not such a standing in court as entitles him to question the validity of the judgment. It is only a judgment creditor, or one claiming under him, that is authorized to invoke the summary exercise of the equitable jurisdiction of the court to set aside an illegal or fraudulent judgment; a creditor at large cannot be heard. (See *Lowber* agt. *The Mayor, &c., of New-York*, *ante*, page 123.)

The assignee, as *assignee*, represents the debtor himself, with whom it does not lie to take advantage of his own statement. As *trustee*, the assignee represents the creditors at large, who do not occupy a position to question the validity of the judgment.

Albany, Special Term, June, 1857.

MOTION to set aside judgment by confession.

On the 31st of December, 1856, the defendant signed a statement, and verified the same by his oath, whereby he confessed himself to be indebted to the plaintiff in the sum of \$4,165.40, and authorized him to enter judgment thereon for that amount. It was stated, that "the indebtedness arose on a judgment in the supreme court of the state of New-York, in favor of Edward Bain, Lucas Hoes and William Bain, against William Kirk and Joseph J. Bullis, and assigned to said plaintiff, and also on a bond, executed by William Kirk and Joseph J. Bullis to the said William Barthrop, in his lifetime, dated the 22d day of May, 1838, for the sum of \$2,000; both of which securities were given for money borrowed by the defendant; and that the sum confessed was justly due to the plaintiff without any fraud whatever."

Upon this statement, judgment was entered in the office of the clerk of Columbia, on the 25th of April, for the amount confessed, with five dollars costs.

On the 4th day of May, 1857, the defendant executed and delivered to Jonathan B. Rider, an assignment of all his property in trust, for the payment of his debts.

The *assignee* moved to set aside the judgment, on the ground that the facts out of which the alleged indebtedness arose, do not sufficiently appear in the statement upon which it was entered.

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JOHN H. REYNOLDS, *for motion.*JOHN K. PORTER, *opposed.*

HARRIS, Justice. It now appears, from the affidavits read in opposition to this motion, that in January, 1843, the defendant and Joseph J. Bullis were indebted to the estate of Bastian Bain, deceased, in the sum of \$1,765.06, for money loaned to them by the executors of that estate, for which sum a judgment was confessed and entered in the supreme court; that on the 17th of May, 1844, the executors duly assigned the judgment to Edward Bain; and that he, on the 2d day of September, in the same year, assigned the judgment to the plaintiff; and that at the time this judgment was confessed, there remained due upon the former judgment the sum of \$1,817.64, with interest from the first of May, 1856.

It further appears, that on the 22d of May, 1838, William Barthrop loaned to the defendant and Bullis, the sum of \$2,000, for which they executed a bond with a warrant of attorney to confess judgment, upon which judgment was entered in the supreme court. On the 21st of March, 1849, another judgment by confession was entered up in favor of John P. Beekman, administrator, &c., against the defendant, for the same amount, upon which last-mentioned judgment there remained due the sum of \$2,262.94.

Had these facts, however briefly stated, appeared in the statement upon which the judgment in question was founded, the case would have been relieved of all difficulty. But instead of this, the only information we can derive from the statement as to the origin of the debt, is, that Edward Bain and others once recovered a judgment in the supreme court against the defendant and Bullis, for money borrowed by the defendant. What was the amount of the loan or for what sum, or when the judgment was recovered, or whether anything remained due upon it, does not appear. The statement in respect to the other ground of indebtedness is less defective, but even this is insufficient. It is stated, that on a specified day the defendant and Bullis executed their bond to William Barthrop, in his

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lifetime, for \$2,000 borrowed money, but it is not stated what amount remained due upon this bond. The whole statement is defective, and were this the only question in the case, I should feel constrained to grant the motion.

But it is insisted that the *assignee* of the defendant has not such a standing in court as entitles him to question the validity of the judgment. I think this position must be sustained. The court, undoubtedly, has a general jurisdiction over its own judgments and process. As between conflicting judgment creditors, it may set aside one judgment or postpone its lien to that of another. Indeed, I suppose that it is competent for the court to secure to a purchaser under its process, the right he has acquired. But it is only a judgment creditor, or one claiming under him, that is authorized to invoke the summary exercise of the equitable jurisdiction of the court to set aside an illegal or fraudulent judgment. A creditor at large cannot be heard. (*See Wintringham agt. Wintringham*, 20 *John*. 296.)

As against the debtor, the judgment is valid. It does not lie with him to take advantage of the defect in his own statement. The object of the statute, as all know, was to guard against fraud and to aid creditors in its detection. The debtor himself needs no such protection or aid. When he makes a voluntary assignment, he substitutes the *assignee* for himself. As *assignee*, he represents the debtor, and as *trustee*, he represents the creditors at large. We have seen that neither debtor nor the creditors at large occupy a position which enables them to question the validity of the judgment. It follows that the voluntary assignee cannot be heard on that question. (*See Searing agt. Brinckerhoff*, 5 *John. Ch.* 329; *Griffin agt. Mitchell*, 2 *Cowen*, 548.) Upon this ground, the motion must be denied, but as the question is new, it should be without costs.

SUPREME COURT.

JOHN DENTHORNE agt. WILLIAM DENTHORNE.

The statements in the complaint in this case, constituting the cause of action of the plaintiff, and which were objected to as insufficient, were *held*, on motion strike out, to be sufficient.

The first portion objected to was considered clearly proper. The second was but giving the defendant more distinct notice of the nature of the proof to be given against him, by statements of greater particularity, which did not seem to be of a character likely to injure him seriously, if at all. The third required some allegation of the kind to a complete statement of the plaintiff's cause of action, though it was somewhat indirect, and might have been made more explicit, and more in accordance with established precedents.

(The complaint, with the objectionable portions indicated, is given entire.)

Brooklyn Special Term, February, 1857.

MOTION to strike out parts of complaint. The complaint is as follows:

[*Title of Cause.*] The plaintiff in this action avers that in the early part of the year 1850, he and the said defendant jointly undertook the building of a church in the city of New-London, in the state of Connecticut, for a congregational society in said city, and that the said plaintiff and defendant commenced their work upon, and for the purpose of erecting, the said church, in the month of April, 1850, and the building and erecting of the said church, by the said parties, occupied until on or about the first of January, 1852.

And the plaintiff also avers that during the same time, the said parties to this action, jointly undertook to perform certain work, and furnish certain materials for two certain dwelling-houses in the said city of New-London.

This plaintiff says that he has not, at any time heretofore, been in copartnership with the said defendant, but only jointly interested with him in relation to the matters aforesaid.

And this plaintiff says that the work done, and materials found in and about the building of said church, by the said par-

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ties to this action, amounted in the whole to the sum of sixteen thousand two hundred and ninety six dollars and ninety-eight cents in value, and that the materials furnished, and the work done by the said parties, in and about the building of the said two dwelling-houses, amounted to the sum of one thousand seven hundred and six dollars, and eighty-eight cents.

And the plaintiff says that the whole of said two sums for said work and materials were paid to the said parties to this action, the said defendant receiving almost the whole thereof in behalf of and for himself and this plaintiff.

This plaintiff also says that he furnished one-half of the funds and means at and for the commencement of the said work, and that the defendant furnished the other half thereof; and that the plaintiff also furnished from time to time during the continuance of the said work, various tools, steel for the making and repairs of tools, and also money for the payment of men employed on, and for the benefit of the said parties in relation to and for forwarding said work.

And the plaintiff says that he hath not received any money on account of the said work and materials, except what he paid, laid out and expended for work and labor, and materials done and furnished in upon, and for the forwarding of the said undertakings of the plaintiff and defendant, and for board, except about the sum of ten dollars; and plaintiff says that he paid out and expended of his own private funds for the use and benefit of himself and the said defendant, in carrying forward their said undertakings, the sum of three hundred dollars, at the least, in the payment for labor, materials and implements, and the repairs thereof, done, expended and used in, upon and about the said undertakings of the parties to this action.

And the plaintiff says that said defendant received a very large proportion of all the money paid for the said work and materials, done and furnished by the said plaintiff and defendant as aforesaid. * And that he appropriated large sums thereof to other purposes than to the joint benefit of

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the parties to this action. * * The plaintiff has been informed and believes, and upon his information and belief, says that said defendant applied large sums by him received for said work and materials, in payment of dues from said defendant, and one Beard, with whom defendant was connected in some public work or employment. * * And the plaintiff further says upon his information and belief, that said defendant hath in other ways, the particulars of which this plaintiff has not been able fully to ascertain, applied other large sums of the money belonging to the said plaintiff and defendant, jointly, on account of the said work done, and materials furnished by them as aforesaid, to the payment of liabilities by the said defendant incurred entirely outside of the said joint affairs of the plaintiff and defendant. *

The plaintiff further says that he has often requested, and demanded of the defendant to render an account of the moneys received by him, for and on account of the work and materials so performed and furnished by the said parties to this action, and demanded a settlement of the accounts between them; all and every of which requests and demands, the said defendant hath neglected and utterly refused to comply with.

And the plaintiff further says on his information and belief, that there has come to the hands of the defendant, at least the sum of two thousand dollars, over and above what has been paid by the said defendant for labor, work and materials furnished to the said parties to this action, by any and every person and persons whomsoever, (except the said parties to this action) in prosecuting the joint undertakings of the parties to this action hereinbefore mentioned.

The plaintiff, therefore, demands that the said defendant account to this plaintiff for all and every sum and sums of money, matter and thing by him received on account of, or for the benefit of the parties to this action in relation to their said joint undertakings, and for judgment final against said defendant for one thousand dollars, with interest thereon from the first day of January, 1853, besides the costs of this action.

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[Between the several stars thus * are contained the objectionable portions.]

BILLINGS, TALCOTT & HUGHES, *for defendant.*
MORSE & SYNDE, *for plaintiff.*

BIRDSEYE, Justice. The first clause objected to in the complaint, is proper, and must stand. The next allegation, as to the payment of dues incurred by the defendant and Beard, is not, perhaps, strictly proper. It should have been an averment that defendant applied these moneys to his own individual use and benefit. The greater particularity employed, does not seem to be of a character likely to injure the defendant very seriously, if at all. It is but giving him more distinct notice of the nature of the proof to be given against him. I do not see how he is "aggrieved thereby." (*See Clarke agt. Harwood*, 8 *How. Pr. R.* 470.)

The next paragraph objected to is, in substance, an allegation that defendant applied other moneys of the parties jointly, to his own exclusive use. Some allegation of that kind was necessary to a complete statement of the plaintiff's cause of action. Though the statement is somewhat indirect, and might have been made more explicit, and more in accordance with established precedents, I am inclined to hold it sufficient. The motion must be denied, but without costs.

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SUPERIOR COURT.

DAVID C. FULLER agt. MATHEW P. READ.—*Commenced October 28th, 1857.*

MATHEW P. READ agt. DAVID C. FULLER.—*Commenced October 31st, 1857.*

F. having a cause of action against R. sued him; R. after that, sued F. on a demand which fell due after F.'s suit was brought, and F. in his answer set up as a counter claim, the cause of action on which his suit was brought.

Held, that F. in that stage of the suits, could not be compelled to elect to prosecute his claim in only one of such suits, and to abide by such election. That the court should not obstruct the orderly course of proceeding in either action, until both were at issue on the merits.

If it then appeared that the merits of both could be fully tried, and full relief given in any one suit, the proceedings might properly be stayed in the other until that one was tried; that the pendency of the suit first brought, was no bar to the right of the plaintiff therein to set up the matter of it, as a defence to the suit subsequently brought against himself.

February 7th, 1858.

Before BOSWORTH, SLOSSON, WOODRUFF and PIERREPONT, Justices.

ON the 28th of October, 1857, *Fuller* brought an action against *Read*, to recover \$4,868, treble the damages alleged to have been sustained by reason of *Read's* using measures not conforming to the legal standard, in measuring ale or beer, sold and delivered by *Read* to the plaintiff, between the 1st of May, 1856, and the 28th of October, 1857. His complaint states, that by means of false measures, he was defrauded of 12,780 gallons of ale or beer, and sustained actual damages to the amount of \$1,621, and claimed judgment for three times that sum, pursuant to the statute, viz: \$4,868. (*Laws of 1851, chap. 134, § 32, p. 256; Bayard agt. Smith, 17 Wend. 89.*)

On the 31st of October, 1857, *Read* sued *Fuller* upon a note made by the latter, for \$1,155.78, falling due on the 29th of October, and given for a part of, or on account of, the ale

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sold and delivered, as before stated. Both actions were brought in this court. Fuller put in an answer to the complaint in the latter action, setting up by way of counter claim, the same facts which he had stated as a cause of action in the complaint in the suit commenced by him on the 28th of October.

On an affidavit stating these facts, and upon the two complaints and the said answer, and on motion of Read, an order was made in both actions, on the 31st of December, 1857, by Mr. Justice SLOSSON, requiring Fuller to elect within ten days, either to proceed in the action which he had commenced to recover his damages, and declaring that if he so elected, he should be precluded from giving evidence in support of his counter claim, or to abide by his counter claim, and declaring that if he so elected, all proceedings in the suit brought by him should be stayed.

If he failed to make an election within the time specified, the order further provided that he should be deemed to have elected to proceed in the suit he had commenced, and should be precluded from giving any evidence in support of his counter claim, and that the answer containing it should be deemed to be stricken out. From that order, Fuller has appealed to the general term. The case was submitted to the court, at general term, on written points, on the 6th of February, 1858.

HULL & STOKER, *for Fuller, the appellant.*

CHARLES CHENEY, *for Read, the respondent.*

By the court—BOSWORTH, Justice. Fuller has not set up, in his answer, any defence to the action on the note made by him, except the cause of action to recover treble the actual damages to which he has been subjected by the use by Read of false measures, in measuring the ale sold and delivered. If the answer in the suit on the note is stricken out, Read will take judgment at once for the amount of the note and may collect it, although Fuller may have a claim against him of more than four times the amount of the note. The order appealed from, declares that unless Fuller makes an elec-

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tion as the order requires, his answer shall be stricken out, and he shall be left to such redress as he may obtain by prosecuting the action which he has commenced. If he elects to abide by that action, the order also directs that the same consequences shall follow.

Hence, whether he elects to abide by that action, or omits to make any election, the consequences which the order declares shall result, are the same. He is not, in either of those alternatives, allowed to extinguish the note by applying enough of the damages to satisfy it, but is required to submit to a judgment against himself upon the note, and to the necessity of paying the judgment, and of course, (if his counter claim be founded in truth,) of paying that amount for ale which he never had, and take his chances of reimbursement, by collecting any judgment he may obtain in the action which he has brought to recover damages for the fraud practiced upon him by Read.

By the terms of the order, he has no option, except to "elect to abide by his counter claim," or submit to a judgment upon the note. If he elects to abide by his counter claim, the order declares that, "his proceedings in the action in which he is plaintiff, shall be, and the same in that event, are hereby stayed." Whether that stay is to be perpetual, the order does not declare; whether an election to abide by his counter claim, when made in obedience to such an order, may not have the effect to preclude his recovering upon the cause of action stated as a counter claim, except to such extent as it may be found or held to be available *as a counter claim*, is not so clear that it can be safely affirmed, that if the whole or some part of the damages claimed, upon the facts as they may be established, cannot be enforced as a counter claim, they may nevertheless, be recovered in an action to be brought for the purpose, if such facts make a case within the statute, notwithstanding the order appealed from, and such an election made under it.

The fact that Fuller brought a suit to recover these damages before the note fell due, does not deprive him of the right, if subsequently sued on the note, to set up as a defence and by

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way of counter claim the facts giving a right to such damages, provided those facts make a counter claim within the meaning of that word as defined by the Code. (*Naylor agt. Schenck*, 3 *E. D. Smith*, 135; *Lightbody agt. Potter*, 10 *Wend.* 534.)

If they constitute a matter of defence, he has a right to set them up and have the benefit of them as a defence to that action.

If it is supposed they cannot be set up as a matter of right, either because he had previously brought a suit to recover them, which is still pending, or because no part of such damages constitute a legal counter claim, such previous and pending action may be set up as a reply to the counter claim, or the counter claim may be demurred to, that the facts stated do not constitute a counter claim.

If the interference of the court is invoked to prevent unnecessary litigation and expense, it should exercise its equitable powers so as not to prejudice any right of Fuller, or deprive him of any legal remedy which the law has provided to resist a claim which he ought not to be compelled to pay, or to recover damages to which he may be entitled.

It is not suggested in the written points forming part of the submitted papers, that the alleged counter claim may not be enforced as such, to the full amount claimed, on proving the facts stated in Fuller's answer. If no such objection can be taken justly, the merits of it may be litigated as well in the suit brought by Read, as in that brought by Fuller. If litigated in the former suit on the merits, the disposition that may be made of it in that action, will conclude the parties, and do justice to both. Such a disposition of it, would render the trial of the action brought by Fuller, unnecessary, might be set up by way of supplemental answer as a bar to its further prosecution, and if decided in favor of Fuller for the amount claimed, might justify an application on his part, to be permitted to discontinue the suit brought by him, without costs.

But if any portions of the damages sought to be recovered by him, should turn out to be damages for a false measurement of ale, other than that for which the note was given, and

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for ale sold and delivered at other and different times, and if for that or other reasons, all of such damages could not be recovered as a counter claim, while a part of them might lawfully be so recovered, it might be proper to permit Fuller to proceed in the action which he has brought, to recover therein such part of the damages to which he may have been subjected, as cannot legally be made the basis of a counter claim in the suit on the note, but which, on the facts as they may be established, he has a right to recover.

We think that Fuller should not be compelled to make such an election as the order appealed from requires; that no order should have been made in the actions interrupting the orderly course of proceeding in either. When both actions shall have been put at issue, if it shall then appear that both causes of action may be tried on their merits in either suit, the court in its discretion may stay proceedings in one, until the trial of that which involves the whole merits has been disposed of.

The court, beyond that extent, should not interfere with a party who, in conformity with law and established practice, is seeking to avail himself of a cause of action, against a person who has sued him, by way of defence, notwithstanding such party may have brought a suit upon the same cause of action, which is still pending.

And no order staying proceedings in either of such two actions should be made, until they are in such a condition that the court can see that the merits of both can be fully tried in the other, and that such stay cannot have the effect to impair or prejudice the rights or remedies of the party stayed, with respect to the subject matter of either action.

We all agree that the order appealed from must be reversed, and the justice by whom the order was made, concurs in that conclusion.

SUPREME COURT.

DANIEL CHAPMAN agt. REUBEN H. FOSTER, HEMAN G. DICKERSON and others.

Where one of several defendants died pending the reference of an action, which survived to his legal representatives, and the surviving defendant who had appeared and answered, moved the court for a dismissal of the complaint as against him, the plaintiff having neglected to proceed and bring in the heirs or devisees of the deceased defendant, either by motion or by supplemental complaint,

The court, in order to set the plaintiff in motion, if he ever intended to start, directed an order that the complaint be dismissed as to the moving defendant with costs, unless the plaintiff within sixty days from the service of the order obtain leave, and file a supplemental complaint, and issue a summons thereon against the persons representing the interest of the deceased defendant.

Wayne Special Term, October, 1856.

MOTION by defendant Reuben H. Foster, for a rule or order dismissing the complaint, and directing judgment against the plaintiff for costs, or for such other order as the court may see proper to grant.

F. E. CORNWELL, *for the motion.*

WILLIAM CLARK, *opposed.*

WELLES, Justice. The action was commenced in July, 1852, to foreclose a mortgage given by Patrick Garrougity, one of the defendants, to the plaintiff, and the defendant Dickerson, and to restrain Saxon B. Gavitt, clerk of Wayne county, who is also a defendant, from discharging the mortgage of record upon a satisfaction piece executed by the said defendant Dickerson, one of the mortgagees, and for the purpose of enforcing the lien of the mortgage for the benefit of the plaintiff. Joseph F. Pollock and Reuben H. Foster were made defendants, as having or claiming some interest in the mortgaged premises as purchasers, or otherwise,

which, if any, the complaint charges, are subsequent and inferior to the mortgage.

The defendants Foster and Pollock appeared and answered separately; neither of the other defendants have appeared or answered.

Issue being joined between the plaintiff and the defendants Foster and Pollock, the action was referred at the Wayne circuit, in October, 1852 to L. Sherwood, to hear and determine the same. The cause was brought to a hearing before the referee on the 19th of February, 1853, when the plaintiff introduced his proofs, and rested. Thereupon the defendant's counsel moved for a nonsuit; and upon the referee intimating an opinion that the motion would be granted, the plaintiff procured leave to introduce further evidence, and thereupon the hearing was indefinitely postponed, and no proceedings have since been had or taken on behalf of the plaintiff. The defendant Pollock died on the 22d July, 1855, claiming to be seized in fee of the mortgaged premises, having devised the same by his last will and testament.

The time has elapsed for the plaintiff to have the heirs or devisees of Pollock substituted in his place as defendants by motion.

The only way to have the action continued against his successors in interest, after a year from his death, is by supplemental complaint, (*Code*, § 121,) and the plaintiff must obtain leave for that purpose on motion. It is quite manifest from an inspection of the pleadings, that the interest of Pollock as claimed in his answer, survives to his heirs or devisees, and it would probably be of no avail to the plaintiff to proceed in the action, without first bringing them in as parties in some way, as no judgment which the court could give would affect them, unless they were parties. The defendant Foster cannot take any measures to bring them in, and he is entitled to have the controversy brought to a conclusion in some way. I can see no objection to his bringing on the hearing before the referee at once, and if he can obtain a report in his favor, to enter judgment upon it. This, probably, the plaintiff

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would not care to have done, and there may be a difficulty in the defendants proceeding in the way suggested, pending the defect of parties. Such difficulty would probably exist, if the interest of the defendants Foster and Pollock were so connected as to render a judgment in Foster's favor improper in the absence of the representatives of the interest of Pollock.

These difficulties, I think, upon the whole, may be best avoided, by setting the plaintiff in motion, with a view to bringing in the necessary parties to represent the interests of Pollock. I shall, therefore, direct an order that the plaintiff's complaint be dismissed as to the defendant Foster, with costs, unless the plaintiff, within sixty days from the service of this order, obtain leave, and file a supplemental complaint, and issue a summons thereon, against the persons representing the interest of the defendant Pollock; no costs of this motion allowed to either party as against the other.

SUPREME COURT.

WM. C. HAGGERTY and others agt. ALBERT GRANGER,
JOSEPH W. COMFORT, JOHN G. VAN COTT, LEONARD G.
KLINCK and NICHOLAS WYCKOFF.

EIGHT OTHER SETS OF PLAINTIFFS IN EIGHT CAUSES agt.
SAME.

An anomaly in the way of *assignments for the benefit of creditors*, is presented in this case. A., B. and C. were members of a copartnership firm. A. and B. wished to make an assignment, giving preferences to their creditors. C., who was worth enough to pay his own debts, and would have been solvent if his firm had been, would not consent to that, but went on and made an assignment executed by himself alone, disposing of all his individual property in trust for his individual creditors; and next he assigned to the same trustee, all his share and interest in the *partnership property*, first, to apply the proceeds to the payment of the partnership debts, according to the established rules of law and equity, which control such cases, (*pro rata*.) Second, to apply the

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residue in payment of his individual debts and liabilities, in the order mentioned, if the individual property should be insufficient.

Afterwards A. and B. made an assignment in the name and for the firm, but executed by them individually, and against the will of C., of all the property of the firm, for the payment of the debts of the firm, in the order mentioned therein. The partnership was not limited, and might terminate at the will of or any of its members.

Held, that both assignments, respecting the partnership concerns, were entirely void for want of power. The assignment by C. was good as to all except the partnership property.

It is well settled in this state, that one partner has no authority, express or implied, from his copartners, to make an assignment to trustees for the benefit of creditors.

It is because the general obligations of law, require partners to pay their debts, that one of them may, without the concurrence of the others, and against their will, deliver either the money or property of the firm directly to a creditor in payment of his debt, although the other creditors are postponed. But there is no obligation of law for the firm to transfer their property to trustees; much less is there any implied authority in one to select his own trustee against the will of the others, and give to him the whole control of the property.

As soon as a firm is insolvent, (especially an unlimited partnership,) any partner may apply for a decree of dissolution and account, and for an injunction to prevent his copartners from disposing of the property, and for a receiver. The property will then be distributed rateably among the creditors without preferences, and each will be heard as to who the receiver shall be.

Both assignments in this case were held to be a cloud over the title of the property, so as to make it proper for the plaintiffs, as judgment creditors, to come into court to have that cloud removed as to them.

Special Term, tried January, 1857.

On the 8th November, 1854, judgments were recovered by the plaintiffs against Granger, Comfort and Van Cott, executions issued thereon, and returned unsatisfied. In December following, this action was commenced to set aside assignments made. In September of that year, Van Cott's individual property was amply sufficient to pay all his individual debts, and he would have been solvent, if his firm had been so. His firm wished to make an assignment giving preferences, which he would not consent to; and on the 18th day of that month, he alone made an assignment, disposing of all his individual property, in trust for his individual creditors, and next he assigned to the same trustee, N. Wyckoff, "all and singular, the share and interest

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which he had, or was entitled to, as a partner in the firm of Granger, Comfort & Co.," in the moneys, goods, wares, merchandise, lease and fixtures of store, good will of business, notes, obligations, judgments, books of account, book debts, claims, contracts, rights and things in action, or property of any nature and kind soever, and wheresoever the same may be, in trust to take possession of such share and interest, and dispose of the said property, and collect the said debts.

First, to apply the proceeds thereof, (after deducting his expenses and legal commission) in due proportion, to the payment of the *debts* and settlement of the *concerns* of the said *partnership*, according to the established rules of law and equity, which control such cases. Second, to apply the residue of said proceeds, in any payment of his individual debts and liabilities, in the order before mentioned, if the individual property should be insufficient for that purpose; after that, if there should still be a surplus, to other purposes named.

On the 3d of October, in the same year, Granger and Comfort by indenture, *made* in the name of themselves and of Van Cott, stating that they composed the firm of Granger, Comfort & Co., but executed by Granger and Comfort only, and signed by them individually, assigned to Klinck all the property of the firm, in trust, to take possession of all the assigned property, and sell it and collect all the debts, and apply the proceeds, first to pay debts of the firm in schedule B.; next to pay all other debts of the firm. This assignment was made against the will of Van Cott and Wyckoff, and on its being made, Klinck excluded Wyckoff from all control over the property of the firm.

Wyckoff on his appointment by Van Cott, immediately went to the store and claimed to be in possession, and to have a right to exercise a control over the affairs of the firm; Granger and Comfort denied his right, and prevented any active interference.

The complaint makes no objection to the assignment by Van Cott, but insists that the assignment made by the other two partners is void as against creditors.

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The complaint is taken as confessed by all the defendants, except Van Cott and Wyckoff, who put in an answer. The answer insists that the assignment was intended to, and had the effect to dissolve the partnership, and that, thereupon, Wyckoff became tenant in common with Comfort and Granger of the partnership property, and that the assignment to Wyckoff for the benefit of all the creditors of the firm *pro rata* out of the partnership property, should be carried out, and that the rights of these plaintiffs' judgment creditors, are subordinate to Van Cott's right, and the right of the other creditors to have an equal distribution of the partnership property, whether the assignment by the two other partners be valid or not.

The plaintiffs insist that that assignment, not being executed by all the partners, but against the will of one, is a nullity as to them, and that they have priority of lien according to the priority of their present actions. The partnership was not to continue for any specified time, and might, therefore, be terminated at the will of any of its members.

MARTIN & SMITHS, *for all the plaintiffs.*

JOHN E. BURRILL, *for defendants.*

MITCHELL, Justice. In *Havens* agt. *Hussey*, (5 *Paige*,) it was decided that one partner could not, against the will of another, make an assignment of the partnership property to a trustee for the benefit of creditors, giving preferences. In *Deming* agt. *Colt*, and in *Hayes* agt. *Heyer*, (3 *Sandf. Superior Ct. Reports*,) it was held that such assignment could not be made, even if no preferences were given. These cases were referred to and approved in *Everson* agt. *Gehrman, &c.*, (10 *How. Pr. R.* 801,) at the general term of the supreme court, in this district. That, however, was not the point then precisely before the court. The decisions thus far made in this state have been on the ground that one partner has no authority, express or implied, from his copartners, to make such an assignment. It clearly is not within the express authority, and to repeat what was said in *Everson* agt. *Gehrman*, "no

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power can be implied, unless it can be inferred that the parties *intended* to grant it." Certainly the parties did not intend that one should have the power to do for them an act which their general obligations did not require them to do, if the others objected to it, and its effect would be, not to continue, but to dissolve the partnership. It is because the general obligations of law require partners to pay their debts, that one of them may, without the concurrence of the others, and against their will, deliver either the money or property of the firm directly to a creditor in payment of his debt, although their other creditors are postponed; he does in this no more than the law would do to the one who first levies an execution. But there is no obligation of law for the firm to transfer their property to trustees, much less is there any implied authority in one to select his own trustee against the will of the others, and give to him the whole control of the property. If one may thus assign the partnership property to one trustee, there is no reason why the other partners may not assign each to a different trustee, unless the one first assigning thereby superseded the power of the others. Then there would be three or more trustees, each under a separate appointment, and each entitled to an absolute control over the property; a position of things which shows that neither can have the control, or the power to make such an assignment. If the assignment first made is to be held controlling, then it is implied that partners intend, in all cases, that if they become insolvent, the one who will be first in the race to make an assignment, shall alone, and against the wishes of the others, control in the selection of the trustee, and that he can make an assignment when the other partners may all believe that one is not necessary, and that they could personally arrange with their creditors. The parties never could have intended to grant such an authority, and there is no obligation of law from which it is to be inferred.

In this case Van Cott assigned his share of the partnership property to the trustee. If this meant only the share that would belong to him after payment of the debts of the firm,

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then it did not make Wyckoff a trustee for the creditors, nor vest him with the partnership property, but only with the right to call the other partners, and those claiming under them, to an account. The assignee then would not stand in the way of the creditors of the firm, and could not object to their taking any legal process to collect their claims. But if it meant (as is to be inferred from the provision in the assignment, that the assignee should, out of the property of the firm, pay its debts,) to transfer the property itself to the assignee in trust to pay the debts, then it is subject to the objection before stated, that it assumes a power not given either expressly or by implication. Nor does it make a difference that the assignment purports to pass only Van Cott's share, and not that of the other partners, assuming that this means the one undivided third in the property itself; then the confusion before pointed out would result, that each partner could appoint a separate trustee, bound to employ the property assigned to him to pay all the debts, but with this difference, that neither would have control over more than one undivided third (or other aliquot) part of any piece of property, or of any chose in action; neither could do any act towards the disposition of the property, without the concurrence of the others; neither to sell a piece of goods, or to collect a debt; all must unite; yet each would claim under a separate title, and not as joint trustees. A power leading to such confusion, and which would manifestly tend to delay creditors, is not to be implied.

Nor is there any imperfection in the law, which makes it necessary to imply this power. As soon as a firm is insolvent, (especially if as in this case, it was not to continue for a specified time,) any partner may apply for a decree of dissolution and account, and for an injunction to prevent his copartners from disposing of the property, and for a receiver. The property will then be distributed rateably among the creditors without preferences, and each will be heard as to who the receiver should be. The difference between that case and this is, that in this, one partner alone attempts to vest his own trustee with the whole power, against the wishes of those who

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have an equal voice with himself, while in that all are heard, and all, through the court, make the appointment; in this, the one alone adjudges of his own independent will, that a trustee and assignment are necessary; in that, all (through the court) pass upon that question.

The assignment by Van Cott is void as to the partnership property, not on account of any fraud, but for want of power, and the assignment by his two copartners giving preferences, is void for the same reason. The trustee was right when brought into court by the plaintiffs, to present the question as to the extent of his power for decision, and has caused no litigation which was not necessary for this purpose; he, therefore, should have his costs. Both assignments cast a cloud over the title, so as to make it proper for the plaintiffs to come into this court to have that cloud removed as to them. The assignment by the two copartners is void entirely for want of power; the assignment by Van Cott is good as to all except the partnership property, and it is not therefore to be declared void; it is enough if the assignee be declared unauthorized to interfere with that property, and enjoined from doing so, and the receiver be authorized to take and sell, or collect all the partnership property, notwithstanding such assignment, and pay the creditors in the order in which their actions were commenced, (the great bulk of the property consisting of choses in action,) and bring any surplus into court to abide the further order of the court. The plaintiffs will also be entitled to their costs in the same order of priority.

It is proper to notice that in the cases quoted, the assignments by one partner were held bad on a bill filed by the copartner, and that in this case, the copartners make no such application. The creditors, however, may come into court and show that there is an assignment in the way of their execution, under which the assignees profess to have a priority over them, and that such assignment is defective for want of any power to execute it. If defective for such a cause, it is as a nullity to any one claiming by operation of law, to have a right to the property of the firm. It is voidable not only

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as against the copartners, but also as against the creditors of the firm, unless the non-assenting partners had, before their actions were commenced changed their mind and assented to it. That which is void for want of power cannot constitute an effectual obstacle to any one who is entitled to be paid out of the property of the constituent.

The judgment will be drafted accordingly, and submitted to defendants' attorneys.

SUPREME COURT.

PHILIP CRIM agt. LEWIS CRONKHITE.

By section 304 of the Code, *costs* are allowed of course, to the plaintiff, upon a recovery in the actions of which according to section 54, a court of a justice of the peace has no jurisdiction.

By section 54, subdivision 4, it is declared that no justice of the peace shall have cognizance "of a matter of account, where the sum total of the accounts of both parties, proved to the satisfaction of the justice, shall exceed four hundred dollars."

Under the Revised Statutes, which contained a similar provision, it has been fully settled by authority, that *payments* made towards satisfying a debt were not *demands*, and constituted no part of an account, but *extinguished* the debt *pro tanto*.

The plaintiff's claim for labor in this case, for which he demanded judgment, was \$336, and interest. The defendant's allegations of payment, and counter claims, for which he demanded judgment, were \$200. On the trial before the referee, he found the plaintiff's claim to be \$260.92, and the defendant's payment and counter claim to be \$232.28. The payments of the defendant, towards the plaintiff's labor, included in the latter amount, were found to be \$95.85. Therefore, the actual *demands* between the parties were only \$397.35. The referee found that the plaintiff was entitled to judgment for the sum of \$28.64. The court thereupon decided that the defendant was entitled to judgment for costs.

Otsego Special Term, December, 1857.

MOTIONS to settle the question as to which party should re-

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cover costs upon the report of the referee in the action. The facts necessary to a correct understanding of the case, sufficiently appear in the opinion of the court

R. M. TOWNSEND, *for plaintiff.*
BENJAMIN ESTES, *for defendant.*

BALCOM, Justice. The referee has found that the plaintiff labored for the defendant one year, lacking twenty-one days, and that such labor was worth \$260.92. He has also found, that the amount of the defendant's account against the plaintiff, by way of "payment and counter claim," was \$232.28; and that as a conclusion of law, the plaintiff is entitled to judgment against the defendant, for the sum of \$28.64. The report is silent on the question of costs.

The affidavits read on these motions, show that the defendant's account against the plaintiff, was made while the latter was performing the labor above mentioned; that the whole of it was charged to the plaintiff, item after item, with the dates thereof, in the defendant's account book; that items of the account, amounting to \$95.85, were for money the defendant paid to the plaintiff, from time to time, towards his labor, for which he took no receipt; also that the plaintiff looked over the account, or the greater portion of it, with the defendant, and admitted its correctness. The affidavits referred to, also show that the foregoing facts were proved on the trial.

The plaintiff's claim for labor, and the defendant's allegations of payment, and counter claim, were put in issue by the pleadings. The demand of judgment in the complaint, was for \$336, and interest thereon, besides costs. The defendant demanded judgment in his answer, against the plaintiff, for \$200, besides costs.

The total amount of the demands of both parties, including payments made by the defendant to the plaintiff, towards the labor of the latter, as established by the referee's report, is \$493.20; but by deducting therefrom the sum of the defendant's payments towards the plaintiff's labor, viz: \$95.85, it

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will be seen that only \$397.35 of *demands*, were in issue at the trial.

The legislature by section 54 of the Code, has declared that no justice of the peace shall have cognizance "of a matter of account, where the sum total of the accounts of both parties, proved to the satisfaction of the justice, shall exceed four hundred dollars." (*Subdivision 4.*) By section 304 of the same act, costs are allowed "of course to the plaintiff," upon a recovery, "in the actions of which, according to section 54, a court of a justice of the peace has no jurisdiction." (*Code*, § 304, *sub. 3.*) The jurisdiction of justices of the peace, over matters of account, was limited in the same manner by the Revised Statutes, (2 *R. S.* 226, § 4, *sub. 4.*) and it was provided therein, that, "where the plaintiff shall recover *any sum* in any court of record, he shall recover costs, if it appear that his claim as established at the trial, exceeded two hundred dollars, and the same was reduced by set-offs; or that the debts, demands and accounts, of both parties, established on the trial, exceeded four hundred dollars." (2 *R. S.* 614, § 9.) It was settled in cases arising under these provisions, prior to the enactment of the Code, that *payments* made towards satisfying a debt, were not demands, and constituted no part of an account; but extinguished the debt *pro tanto*. (*Matteson agt. Bloomfield*, 10 *Wend.* 556; *Mills agt. New-York, C. P. id.* 557; *Lamoure agt. Caryl*, 4 *Denio*, 370. See 2 *Cowen*, 418.) Within this rule the several payments made by the defendant to the plaintiff, towards the labor of the latter, amounting to \$95.85, although charged to the plaintiff, with items for goods sold to him on the defendant's books, cannot be considered in determining whether the sum total of the accounts of both parties exceeded four hundred dollars; but the amount of such payments must be regarded as having extinguished a like portion of the plaintiff's claim for labor. This rule is too well settled to be departed from; and it shows that the sum total of the accounts of both parties was less than \$400; and that a justice of the peace had cognizance of the action. The plaintiff, therefore, having recovered less than \$50 damages, is not entitled

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to costs; but by section 305 of the Code, the defendant is entitled to a judgment for his costs in the action.

The judgment in favor of the plaintiff for \$28.64 damages, and the one in favor of the defendant for costs, must be in the same judgment roll. (*See 3 Wend. 308; 12 id. 236; 4 Hill, 588; Gra. Pr. 2d ed. 339; Yates Pleadings, 805 and 806.*)

SUPREME COURT.

THE BOSTON LOCOMOTIVE WORKS agt. HIRAM WRIGHT,
WILLIAM H. RITTER and others.

In an action or defence founded upon a written instrument for the payment of money only, where such instrument is in the possession of the agent or attorney of the party, the agent or attorney who *verifies* the pleading (under § 157 of the Code,) must state that he has possession of the instrument described in the pleading, that it is inconvenient for any, or some reason, (to be stated,) to procure the verification of the party; and also, what knowledge he has, if any, or grounds to believe that the written instrument is genuine, as that he knows the signature of the party, or he has admitted it, or any other appropriate fact on the subject. A very slight reason will obviously suffice.

But in the large class of actions and defences not founded upon written instruments, for the payment of money, provision is made aside from the verification of the pleadings by the party, in that portion of § 157, which reads, "or if all the material allegations of the pleading be within the personal knowledge of the agent or attorney."

Under this clause, general or special agents of any party, having actual personal knowledge of the matter stated or alleged in the pleading, may in all cases verify the same, to the same effect as the party.

But in making such verification, the agent or attorney must show, or state his character as agent, the nature of his agency, so as to show that his knowledge grew out of, or pertained to his business or trust, and must state his knowledge, or the grounds of his belief in respect to the allegations of the pleading, and why it is not made by the party.

Because one man is agent for some purposes for another, he is not thereby qualified to verify all complaints or answers for such principal. However convenient it might be in practice under the Code, an agency to verify pleadings will hardly answer.

The verification of the answer by the agent in this case was held defective on two

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grounds: 1st. It did not show in what way or to what extent he was agent, or for what purpose. 2d. That the agent did not profess to have any knowledge, or did not state any, in respect to the "material allegations of the pleading."

A *party* in this class of actions, may verify a pleading upon *information and belief*, but the verification at all by an *agent*, depends upon the fact that "all the material allegations of the pleading are within his personal knowledge." And this is so, although the party and his attorney or agent reside in different counties.

Monroe Special Term, September, 1857.

MOTION to set aside judgment, in an action upon a promissory note, against the makers and indorsers. The makers put in an answer upon information and belief, denying that the plaintiffs were duly incorporated, and alleging that the plaintiffs were not the owners of the note described in the complaint, but the same belonged to one Van Keuren. The answer was verified in due form by the defendants Wright and W. H. Ritter, and by the said Ritter, for the co-defendant Michael Ritter, as follows: "And the said Ritter further says, that he is agent for Michael Ritter, and has the charge of said Michael Ritter's business in said county; that said Michael Ritter does not reside in, and is not now within said county of Monroe; and that this deponent is more familiar with the matter upon which this action is founded, than the said Michael Ritter; deponent's knowledge, information and belief therein, being founded in communications with the plaintiff's attorney and others; and that it is, for the same reason above mentioned, that this complaint is not verified by the said Michael Ritter, in person."

The plaintiff had given notice that the verification was insufficient and had disregarded it, and entered judgment against Michael Ritter. This judgment the defendant now moves to set aside.

F. A. WHITTLESEY, *for defendant.*

W. F. COGSWELL, *for plaintiff.*

E. DARWIN SMITH, Justice. Section 157 of the Code is not

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particularly perspicuous. Its provisions have given occasion for considerable diversity of construction. It was a cardinal policy with the codifiers to secure the utmost practicable simplicity in pleading. That object they justly considered would be greatly promoted by requiring all pleadings to be verified. In this section they sought to contrive a form of verification, which should possess sufficient amplitude to meet the numerous exigencies of legal proceedings, and be adapted alike to enforce equitable and common law rights. A verification by the party would, of course, always be sufficient. But this in many cases, would be impracticable or inconvenient, in respect certainly to the many common law rights of action, all to be embraced under one form or mode of proceeding. The rule of requiring a verification by the party was, therefore, relaxed or departed from, in two instances. 1st. "Where the action or defence was founded upon a written instrument for the payment of money only, and such instrument was in the possession of the agent or attorney of the party."

This provision was obviously designed to allow attorneys intrusted with the collection of bills of exchange, promissory notes, and other money demands in writing, to commence suits on such demands, and verify the complaint, and so of defences to suits upon such written instruments, in like manner to verify the answer.

The only restraint upon this absolute right of the attorney to verify the complaint or answer, in all the cases above mentioned, is contained in the next paragraph of this section, "that when the pleading is verified by any other person than the party, he shall set forth in the affidavit, his knowledge, or the grounds of his belief on the subject, and the reason why it is not made by the party."

Under this paragraph of the section, the attorney verifying a pleading must state that he has possession of the written instrument described in the pleading; that it is inconvenient, for any or some reason, to procure the verification of the party, and also what knowledge he has, if any, or ground to believe that the written instrument is given, or that he knows the sig-

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nature of the party, or he has admitted it, or any other appropriate fact on the subject. A very slight reason will obviously suffice.

Thus provision is made for the verification of pleadings, setting up or counting upon a written instrument, for the payment of money in all cases, by the *party* or his *attorney*.

2d. But there is a large class of actions and defences, not founded upon written instruments, for the payment of money. Provision is made for this class of actions, aside from the verification thereof by the party, in the following portion of the section, "*or if all the material allegations of the pleading be within the personal knowledge of the agent or attorney.*" Under this clause of the section, general or special agents of any party, having actual personal knowledge of the matters stated or alleged in the pleading, may in all cases verify the same, to the same effect as the party.

But in making such verification, the agent or attorney must show or state his character as agent, the nature of his agency, so as to show that his knowledge grew out of or pertained to his business or trust, and must state his knowledge, or the grounds of his belief, in respect to the allegations of the pleading, and why it is not made by the party. In this case, the verification, I think, is defective upon two grounds, 1st. It does not show in what way or to what extent, W. H. Ritter was agent of Michael Ritter, or for what purpose. The affidavit states, that W. H. Ritter had charge of all the business of Michael Ritter in this (Monroe) county, but what business had Michael Ritter in this county? Had he any other business than the defence of this suit, and if so, what was it? Was it any business connected with the matter in question in this suit, or out of which the action arose, or which in any degree qualified the said agent to verify such answer? The agency obviously must have some relation to the subject matter of the suit, or the matter in dispute, to bring the case within the terms or intent of this statute. The agency must be such a one as would ordinarily bring "all the material allegations of the pleading within the personal knowledge of the agent or attor-

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ney," where the agent in the transactions in question, was really a substitute for his principal, when he was a party in fact, to the matters in controversy, and had personal knowledge thereof.

Because one man is agent for some purposes for another, he is not thereby qualified to verify all complaints or answers for such principal. An agency to verify pleadings will hardly answer. Many men, perhaps, would take such an agency and attempt to fulfil it, but the court cannot sanction such agencies. The party, or a real agent or attorney in fact, in respect to the subject matter, must verify pleadings. Another objection to this verification, is, that W. H. Ritter, the agent, does not profess to have any knowledge, or does not state any, in respect to the "material allegations of the pleading."

He states that "he is more familiar with the matters upon which this action is founded, than the said Michael Ritter." This may be without possessing any knowledge on the subject, at least it is not an assertion that "all the material allegations of the pleadings are within his personal knowledge." Connected with the answer, in which the allegations are upon information and belief, it entirely fails to meet the requirement of the statute. A party may verify a pleading upon information and belief, but when the agent comes to make the verification, his qualification to verify it at all, his power of attorney to serve for his principal, depends upon the fact that "all the material allegations of the pleading are within his personal knowledge," unless the action or defence is upon a written instrument for the payment of money, as above stated. The legislature did not intend to make this verification of pleadings a mere idle formality. They intended to secure truth in pleading, and to require the parties to actions to state their cause of action or defence according to the actual facts, and to assume, in this particular, their proper legal responsibility in respect to such pleadings. It was urged on the argument, that the party and his attorney residing in different counties, the answer might be verified upon information and belief by the attorney or agent. I cannot agree that the stat-

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ute may be evaded in that way. If by employing an attorney in a county different from that of his own residence, a party might evade the verification of pleading, many would resort to that expedient. When a defendant could not deny the allegations of a complaint, he would employ some attorney in a neighboring county to defend the suit, and make the requisite verification upon information and belief. The only cases where attorneys and agents can verify pleadings, are those specified in the section as above stated. The fact that the party resides in another county, is a proper matter of excuse, to be specified as one of the reasons why the verification is made in those cases, by the attorney or agent.

The motion must be denied, with \$7 costs.

SUPREME COURT.

MATHEW W. BENDER agt. **ALBERT SHERWOOD** and others.

The Code contains a provision of this kind: "When the answer of the defendant admits part of the plaintiff's claim to be just, the court on motion, may order such defendant to satisfy that part of the claim, and enforce the order as it enforces a provisional remedy."

This remedy is extraordinary and severe. It should only be granted in a case clearly within the terms and spirit of the statute.

Where the defendants admitted by their answer that they had in hand the fund which the plaintiff sought to have paid over to him, but they were ignorant whether the fund belonged to the plaintiff, or a third person who claimed it, and asked that they might be permitted to pay the money into court, or that the court might make some order in respect to its application,

Held, that it was not a case where this summary remedy would apply. The defendants did not "admit a part of the plaintiff's claim to be just."

Had the plaintiff in his action not claimed from the defendants a larger sum, and required them to answer, it would have presented a proper case for interpleading under the 122d section of the Code.

But before the court can make an order that another person be substituted, it must appear that the defendant is entitled to be discharged from all liability upon any part of the plaintiff's claim. *It seems*, therefore, that such substitution cannot be made under this statute.

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Albany Special Term, December, 1856.

MOTION for order requiring defendants to satisfy part of plaintiff's claim. On the 8d of April, 1856, A. H. Parks made his draft upon the defendants, in favor of the plaintiff, and delivered the same to the plaintiff, whereby he requested the defendants to pay to the plaintiff or his order, the sum of six thousand dollars; and on the same day, the defendants, the said draft having been presented to them, accepted the same as follows: "accepted, payable at our office, on or before 1st June, from any moneys in our hands belonging to A. H. Parks." It is alleged in the complaint, that at the time the draft was presented for payment, and on and before the 1st of June, 1856, the defendants had in their hands moneys belonging to Parks, more than sufficient to have paid the amount of the draft.

The defendants, in their answer, deny, that at any time after the date of the draft, they had in their hands moneys belonging to Parks sufficient to have paid the same, but they admit that, at the maturity of the draft, they had, and still have in their hands, the sum of \$3,692.87, belonging to Parks; but they allege that Parks died on or about the first of May, and that the administrators of his estate, duly appointed, before the maturity of the draft, claimed the moneys in the hands of the defendants, belonging to Parks, and forbade their paying such moneys to the plaintiff. The defendants further state, that they are ready and willing to pay the amount in their hands into court, or upon its order, but being ignorant of the rights of the parties, they cannot safely pay the same to the plaintiff, without subjecting themselves to the risk of litigation. The plaintiff moved for an order requiring the defendants to pay over to him the sum of \$3,692.87 in part satisfaction of his claim.

JOHN K. PORTER, *for plaintiff.*

LEWIS BENEDICT, JR., *for defendants.*

HARRIS, Justice. "When the answer of the defendant

admits part of the plaintiff's claim to be just, the court, on motion, may order such defendant to satisfy that part of the claim, and enforce the order as it enforces a provisional remedy." This is the provision under which the plaintiff claims the summary interference of the court. The remedy is extraordinary and severe. It should only be granted in a case clearly within the terms and spirit of the statute. This is not such a case. The defendants do not "admit a part of the plaintiff's claim to be just." All they admit is, that they have in hand, the fund which the plaintiff seeks to have paid over to him, but they state that they are ignorant whether that fund belongs to the plaintiff or the administrators of Parks. Under these circumstances, they ask that they may be permitted to pay the money into court, or that the court may make some order in respect to its application. In other words, without admitting the right of one party or the other to the fund in question, they state the facts, and submit the question to the court.

Had this fund been the only subject of controversy, it would have been a proper case for interpleading, under the provisions of the 122d section of the Code. But, as the plaintiff claims judgment for the whole amount of the draft, the defendants, in order to protect themselves from further liability, were bound to answer; and I do not understand that a defendant can, under the statute referred to, have another person substituted in his place, as to a part of the plaintiff's demand, and interpose a defence as to the residue. Before the court can make an order that another person be substituted, it must appear that the defendant is entitled to be discharged from all liability upon any part of the plaintiff's demand. The defendants, therefore, had no alternative but to answer.

It may be, that upon the trial, the court will think it so clear that the plaintiff is entitled to the fund, that it will direct it to be paid over at once. It may be, too, that it will be thought proper to require the administrators of Parks to be made parties to the action, before the question is finally determined.

Molony agt. Dows.—Same agt. Turett.

However this may be, the defendants are entitled to the judgment of the court, upon the case they have made by their answer. The motion, therefore, must be denied, but it is without costs.

NEW-YORK COMMON PLEAS.

JAMES R. MOLONY agt. JAMES DOWS.

THE SAME agt. MYERS F. TURETT.

Under the Code a party has the right to set forth his cause of action *fully*, and unless he burdens his pleading with matters that are totally irrelevant, impertinent, or imposes upon the defendant the necessity of specifically traversing a great number of *facts* which are more properly *evidence* in support of a cause of action than substantive averments to show that a cause of action exists, the defendant cannot be regarded as aggrieved thereby.

Motions to strike out parts of a pleading as irrelevant or redundant, are not to be encouraged unless it is manifest to the court that it would be to the *prejudice* of the party who has to answer, to suffer the objectionable matter to remain.

Nor is a court to be taxed with the labor and trouble of minutely inspecting a pleading upon summary motion of this kind, for the purpose of ascertaining whether averments are or are not relevant, unless in cases when it is absolutely incumbent upon the party to get rid of them, to enable him to frame a proper answer.

We have now no *fatal variance* between the *pleading* and the *proof*, which under the former system of pleading was so well calculated to prevent the pleader from setting forth his cause of action, or grounds of defence, in detail and particularity. He was well aware of the consequences of not proving his averments with the same particularity that he made them.

Under the present system, a superabundance of averments, or matter in a pleading, is visited with the penalty of a motion at special term to strike out, thus throwing upon the court the duty and responsibility in a summary way, of deciding what is and what is not irrelevant and redundant matter. [*And yet it seems by a late report of a committee of the legislature of 1857, the courts are (impliedly, at least,) censured for spending so much time on the hearing and decision of special motions.* REPORTER.]

The plaintiff in his complaint in this case, stated what he thought was necessary to charge the defendants with a combination, as members of a vigilance committee in San Francisco, California, to injure the plaintiff, by his arrest and im-

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prisonment, and deportation and banishment from that state, and the decision of the court upon motion to strike out portions of the complaint, shows what averments and matter they thought it necessary to strike out, and what should stand.

Special Term, January, 1858.

MOTIONS by the defendants to strike out divers portions of the respective complaints in the above actions.

The character of the complaints and of the portions proposed to be stricken out, sufficiently appear in the opinion.

JER. LAROCQUE, *for defendants.*

GEO. BOWMAN, *for plaintiff.*

DALY, Judge. The causes of action separately set forth in the three first counts are all embodied in the fourth count. It is not necessary that the affidavit should have been made of the identity. It is apparent upon the mere reading of the complaint. The plaintiff must, therefore, be compelled to elect whether he will rely upon the fourth or the three first counts, and as he has expressed the wish to rely upon the fourth count, if the court shall be of the opinion that he is bound to elect, the first count will be stricken out.

The fourth count set forth three grounds of action, an assault, false imprisonment and conspiracy to injure. The circumstances out of which these three grounds of action arise are set forth at length, and are substantially the arrest, imprisonment and subsequent banishment of the plaintiff, from the state of California, by force and violence, without warrant of law, by the defendant, co-operating with others as members of an organization known as the vigilance committee of San Francisco. The assault and imprisonment do not appear to be relied upon in this count as distinct causes of action, but are set forth as the result and consequence of the alleged combination and conspiracy to injure the plaintiff, which is the general cause of action upon which the pleader, in framing this count, means to rely.

An unlawful combination or conspiracy to injure another, is

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an indictable offence, though nothing be done to the injury of the individual. (*Regina* agt. *Best*, 2 *Ld. Ray.* 1167; *King* agt. *Armstrong*, 1 *Vent.* 304; *King* agt. *Kimberly*, 1 *Lev.* 62.) And if the conspiracy or combination be productive of injury to the person, reputation or property of the individual, he may maintain a civil action for damages against any or against all of the conspirators. (*Savil* agt. *Roberts*, 1 *Salk.* 14; *Anon.*, 8 *Salk.* 97; *Til.* 46; *Sut.* 122.) Formerly the remedy for this injury was by a writ of conspiracy, which was in the nature of a civil action, but it was afterwards merged in the more convenient remedy of an action upon the case. (*Subley* agt. *Mott*, 1 *Wils.* 210.) The combination or conspiracy set forth here, is not averred to have been formed for the direct purpose of injuring the plaintiff. The defendants and others are alleged to have combined for the purpose of putting one Casey to death: to resist all courts or officers who should seek to hold them accountable, and to commit such other crimes and offences, as such resistance to the law might involve, or the giving of a public color or motive to their acts might suggest or occasion; that they assumed the name of the vigilance committee of San Francisco, and suddenly in surprise of the authorities, and of the peaceable citizens, seized all the arms that could be found, and organized bands of armed men who obeyed their will. It is then averred, that the governor of the state of California, called upon them to desist; that they refused; that the governor then issued a proclamation calling upon all able-bodied citizens to enrol themselves in the militia, and aid the government in subduing the insurrectionary conspiracy; that the plaintiff, in pursuance of such request, was enlisted and enrolled himself in the militia; that the governor issued a requisition upon General Wool for certain arms, which was complied with, and which were placed in the charge of the plaintiff and others to be conveyed to San Francisco, for the use of the state, when the plaintiff was assaulted, arrested and imprisoned by the direction of the said vigilance committee, the arms taken out of his possession, and after being kept for some time in close confinement, and denied all access to his

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friends, or of the means of attending to his affairs, and after being subjected to hardships, contumely and insult, that he was finally put on board of a vessel, and compelled to leave the state under the threat of death if he attempted to return.

The injury of which the plaintiff complained, having been the result of orders or directions given by the vigilance committee, and as the defendants' liability to the plaintiff for these injuries, is predicated upon their being members of that organization, aiding and co-operating with them in their alleged unlawful acts, it was essential to a clear understanding of the ground of action relied upon, that the general scope and object of the alleged unlawful combination should be averred, and this could scarcely be done, without some reference to their acts and doings.

A party has the right to set forth his cause of action fully, and unless he burdens his pleading with matters that are totally irrelevant and impertinent, or imposes upon the defendant the necessity of specifically traversing a great number of facts which are more properly evidence in support of a cause of action, than substantive averments to show that a cause of action exists, the defendant cannot in the language of the Code, be regarded as aggrieved thereby.

Motions of this kind, are not to be encouraged, unless it is manifest to the court that it would be to the prejudice of the party who has to answer, to suffer the objectionable matter to remain. A court is not to be taxed with the labor and trouble of minutely inspecting a pleading upon summary motion of this kind, for the purpose of ascertaining whether averments are or are not relevant, unless in cases when it is absolutely incumbent upon a defendant to get rid of them, to enable him to frame a proper answer to the complaint. Under the old system of pleading there was no objection to the plaintiff setting forth his cause of action as minutely as he thought fit. He merely incurred the liability of proving it with the same particularity with which he averred it. A mode of pleading that was generally carefully avoided, to escape the consequence of fatal variance between the pleading and the proof.

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I am induced to make these remarks, from the trouble imposed upon the court in going over this voluminous complaint to consider the various passages proposed to be stricken out; the greater part of which, I am satisfied, if not strictly relevant according to the rule of good pleading, would still work no prejudice to the defendant if suffered to remain. I have noted in the margin of the complaint, what passages I have allowed to be stricken out and to what extent; and the passages objected to, which I have allowed to remain. I have allowed a large portion of the averments in the first part of the *count* to remain, as they are essential to a clear understanding of the nature of the combination of which the defendants are averred to have been members, and in the prosecution of the general object of which, the plaintiff is alleged to have suffered injury.

Many passages in this count, proposed to be stricken out, consist of the averment of facts showing special damages sustained by the plaintiff, not necessarily the result of his arrest and imprisonment, or deportation and banishment from the state of California—such as the breaking up of his business, and the like. Damages which are not the immediate and natural consequences of an unlawful act, or which the law would not presume necessarily to flow from it, must be specially stated in the complaint, or the plaintiff will not be allowed upon the trial to go into evidence to prove such items of damage. (*Squier agt. Gould*, 14 *Wend.* 159; *Strang agt. Whitehead*, 12 *id.* 64; 1 *Chitty Pl.* 371; *Sedg. on Damages*, 2d ed. 67, 68; *Sayer on Damages*, 315.)

Such averments of special damage are not traversable, but they are necessary in the complaint, that the defendant may not be taken by surprise upon the trial, but may be prepared with evidence to rebut the proof offered of such special damages, or the amount or extent of it. These averments, therefore, have been allowed to remain.

Facts set forth in the complaint, which are intended to be relied upon in aggravation of damages, so far as they could be distinguished from averments essential to the statement of the

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cause of action, have been stricken out. Such matters are allowed to be given in evidence to show the *quo animus*; (*Rustel* agt. *Macquester*, 1 *Camp.* 49, n.; *Shock* agt. *McChesney*, 2 *Yates*, 473; *Wallis* agt. *Mase*, 3, *Binney*, 546; *Kean* agt. *McLaughlin*, 2 *Serg. & Rawle*, 469; 2 *Starkie on Slander*, 56,) but they are never pleaded, (*Warne* agt. *Croswell*, 2 *Stark. R.* 457.)

The averment that the vigilance committee caused to be published in numerous organs conducted by them, that the plaintiff was a notorious criminal, and worthless, disreputable character, has been allowed to remain, as it is an averment of special injury sustained by their acts. (*Regina* agt. *Best*, 1 *Salk.* 174; 2 *Ld. Ray.* 1167; *Anon.*, 3 *Salk.* 97.)

An order may be entered, striking out the first three counts, and such parts of the fourth count, as are indicated in the margin, without costs to either party.

SUPREME COURT.

SAMUEL F. WITHERSPOON and others agt. JOHN H. VAN DOLAR.

An answer which denies that the plaintiffs are the owners and holders of the draft, is a simple denial of a legal conclusion, and is frivolous. (*See Holstein* agt. *Rice* and note, ante p. 1.)

A justice of this court *at chambers*, on an application for judgment on account of the frivolousness of the answer, has power under § 247 of the Code, to make an absolute or *conditional* order for judgment, *precisely as at special term*.

The power to hear the motion, necessarily includes the power to make such decision upon it as the court would make in term. Such an order or decision as the justice of the case requires.

Therefore, where it appears that the answer is put in, in good faith, and merits are properly stated and sworn to, a *new* or *amended answer* may be allowed upon terms.

At Chambers, October, 1857.

MOTION to strike out answer, and for judgment for the frivolousness of the answer. Action upon a bill of exchange, by the payees against the acceptor.

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The answer denied that the payees were the owners and holders of the draft, and alleged that it belonged to one Meachum; and in a second answer, set up deceit in the sale of the goods by said Meachum, for which the bill was drawn and accepted. The answer was sworn to, and was accompanied by an affidavit of merits.

G. H. HUMPHREY, *for plaintiffs.*

L. F. HOWE, *for defendant.*

E. DARWIN SMITH, Justice. The answer is clearly frivolous so far as relates to the denial that the plaintiffs are owners and holders of the draft. This has been so held in numerous decisions. It is considered in such decisions a simple denial of a legal conclusion; and the second answer is bad also, as it sets up no matter of defence against the payee and holder of the draft. But if the matters stated in both answers were properly stated in one, showing, as the defendant claims, that the payees are mere agents of Meachum, for the collection of the bill, and have no beneficial interest therein, and that the draft was drawn and accepted before the fraud set up in the answer was discovered by the defendant, and that the suit is prosecuted for the sole benefit of Meachum, it would doubtless be a defence. The question then arises, whether I can allow the defendant to amend his answer, or must give judgment for the plaintiff, and drive the defendant to a motion at special term, to be let in to defend.

I cannot doubt the power of a judge at chambers, upon applications like this, under section 247 of the Code, to make an absolute or conditional order for judgment, *precisely as at special term*. The application may be made "to a judge of the court either in or out of court." The application is a *motion*—a motion which the legislature has authorized a judge to hear *out of court*, as well as *in court*—precisely like a motion to dissolve an injunction under section 225.

The power to hear the motion, necessarily includes, in my opinion, the power to make such decision upon it as the court

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would make in term. Just such order and decision as the justice of the case requires. To hold otherwise, seems to me calculated to work many times much injustice, as well as needlessly to increase the burden of the court by a double hearing, in effect, of one motion, and also as objectionable as tending unnecessarily to multiply special motions, which now tax to so great a degree the time and attention of the court.

In a case like this, where the judge is satisfied that the answer was put in in good faith, and that the defendant really believes, upon the advice of counsel, that he has a good defence, and swears to merits upon such advice, I think the order for judgment should be *conditional* and should allow the defendant to put in a new or amended answer upon terms. There must be judgment for plaintiff in this case, with leave to defendant to amend his answer, or put in a new one within five days, on payment of \$10 costs.

NEW-YORK COMMON PLEAS.

AUGUST WETTER agt. HERMAN SCHLIEPER, OTTO HAAR-
HAUS and FREDERICK W. BOHNSTEDT.

Two partners, in the absence from the country, and without the knowledge or assent of their *copartner*, (three constituting the firm,) have no authority to make an *assignment* for the benefit of creditors *generally, without preference*.

If the power does not exist in any number of partners less than the whole, to make an assignment *giving preferences*, it is not discovered by what process of reasoning it can be determined that any one partner can vest the entire partnership assets in a trustee by an assignment *without preferences*.

Such an assignment being absolutely void, it presents no obstacle to a suit by the *co-plaintiff*, who repudiates the assignment, for the dissolution of the co-partnership, an order for accounting, and the appointment of a receiver of all the property of the partnership, and to set aside such assignment. An *injunction*, also, until final judgment in the action, will be allowed.

Special Term, January, 1858.

In January 1857, the plaintiff and the defendants Schlieper

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and Haarhaus formed a copartnership for the transaction of an importation and commission business, under the firm name of "Wetter, Schlieper and Haarhaus," to continue for three years, and end in December, 1859. The place of business of the firm was at the city of New-York, where the partners resided.

In May, 1857, the plaintiff went to Europe temporarily, on the business of the copartnership, to solicit consignments, &c.

While thus occupied, and on October 20th last, the defendants Schlieper and Haarhaus wrote to him, requesting his immediate return. This letter reached him in Germany, November 9, when he immediately returned to the city, coming by the way of Switzerland, &c., and arrived here December 14, 1857

His intention to so return, was communicated to his partners by a letter written about the 9th of November, and which was received here about the first of December.

On December 5th, 1857, the defendants Schlieper and Haarhaus without the knowledge or consent of the plaintiff, executed, and delivered to the defendant Bohnstedt a general assignment of all the partnership property, in trust for the benefit of the creditors of the firm. The assignee was a clerk of the firm, and is a resident of the state of New-Jersey.

The plaintiff arrived in this city on December 14, 1857, repudiated the alleged assignment, and has never ratified it in any way. It is conceded that the firm is insolvent. On December 28, 1857, this suit was commenced, and upon a complaint alleging these facts, &c., asks the court to dissolve the copartnership, order an accounting, appoint a receiver of the partnership assets, to set aside as fraudulent and void the attempted general assignment as made by the defendants Schlieper and Haarhaus, and restrain the defendants, &c.

A temporary injunction having been ordered, a motion is now made to continue it until the final determination of the action, and also appoint a receiver, &c., of the property of the firm.

The defendants, by their answer, deny the fraud, &c., alleged in the complaint.

A. F. SMITH, *for plaintiff*.

ALBERT MATHEWS, E. V. R. WRIGHT and JAMES MONCRIEF, *for defendants*, who insisted,

First. The plaintiff stands in a different position from a judgment creditor, and cannot impeach the assignment for any fraud which does not directly affect himself. The partnership being insolvent, he has no interest in the assets specifically. The interest of all parties, so far as a court of equity will listen to them, is that the assets be distributed rateably among all the creditors. This, the defendants have sought to effect, they have no further control of the assets. The assignee is bound to do it, and any departure from his duty will be ground of removal; but so long as he performs his duty, the plaintiff cannot be heard to complain in a court of equity. He has no lien upon the assets. (*Greenwood agt. Broadhead*, 8 Barb. R. 598; *Crippen agt. Hudson*, 3 Kern. R. 161.)

(a) The alleged frauds are denied in the affidavits; besides, they do not touch the legal capacity or actual conduct of the assignee.

Second. The insolvency of the assignee, if alleged or proved, is not sufficient to authorize the court to interfere, so long as the creditors, who alone are interested, do not complain. They have a right to rely upon integrity in preference to a property qualification. Their silence is evidence of their acquiescence. But in order to be even evidence of intent to defraud a creditor, there must be actual insolvency, and it must be known to the debtor at the time of the assignment. Here is no insolvency. (*Browning agt. Hart*, 6 Barb. R. 91; *Reed agt. Emory*, 8 Paige R. 417.)

Third. The great experience of the assignee, and his long acquaintance with the affairs and assets of the firm, rendered him a fit person to be assignee, and would alone be sufficient,

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even in a creditor's suit, to rebut any evidence of fraud. (8 *Paige*, 417.)

Fourth. The allegations of fraud and insolvency are wholly denied, and explained in the affidavits, and the whole equity of the plaintiff's complaint is denied. This alone, is a sufficient answer to any application for an injunction. The allegations on information and belief are to be disregarded. (*Campbell* agt. *Morrison*, 7 *Paige* R. 157; *Manchester* agt. *Day*, 6 *Paige* R. 295.)

Fifth. The pressing necessity of the case, and the absence of the plaintiff from the country, are a sufficient reason for the assignment in question being made without his assent. It was a highly equitable act, and most for the benefit of all the creditors of the firm, and the plaintiff himself. (*Fisher* agt. *Murray*, 1 *E. D. Smith* R. 341; *Mabbett* agt. *White*, 2 *Kern. R.* 442; *Kemp* agt. *Carnly*, 3 *Duer* R. 1; *Anderson* agt. *Tompkins*, 1 *Brock. R.* 456; *Harrison* agt. *Story*, 3 *Cranch* R. 289; *Robinson* agt. *Croweler*, 4 *McCord* R. 519; *Robinson* agt. *McIntosh*, 3 *E. D. Smith* R. 288.)

Sixth. To set aside the assignment, and appoint a receiver, would open the property to the chances of a wasteful race of diligence among eager creditors, and those whose debts are not yet matured will be wholly remediless. This would be inequitable in the highest degree. The appointment of a receiver would not save the property from the rights of judgment creditors, even if the court were bound to interfere against the assignee, on the application of a judgment creditor seeking his preference by reason of his diligence, and the assignment be fraudulent as against a judgment creditor, it would still be valid between the parties, and the plaintiff bound to acquiesce in the acts of the defendants.

The plaintiff does not offer to do equity by offering to join in the assignment, if any person shall be appointed by the court, unobjectionable to himself, to execute the trusts in this assignment by distributing the assets rateably. (*Corning* agt. *White*, 2 *Paige* 567.)

1. A judgment that requires the payment of money may

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always be enforced by an execution against the property of the judgment debtors, and the execution to be directed to the proper officer, is a matter of legal right. (2 R. S. (4th Ed.) p. 611, § 1; Code, § 285.)

2. The officer has the right, and it is his duty, to levy upon all such property; and in this case he had the right to levy upon the partnership assets, *if they still belonged to the above named parties*, as it is contended they did.

3. The legal title to the partnership assets would remain in the partners, notwithstanding the commencement of this action, and the appointment of the receiver.

(1) The creditors of the firm certainly acquire no lien on the property by reason of anything done between the partners in this suit, prior to a decree, nor have they any control over the suit.

(2) The receiver before the decree, is a mere custodian of the property for the benefit of the parties to the suit.

(a) It is abundantly competent for the parties to the suit, at any time before a decree, to settle the suit, and discharge the receiver, taking the property into their own hands.

(b) The receiver has no title for the creditors, nor any authority to transfer or sell the property, until a decree.

4. The appointment of a receiver in this action, and the possession by the receiver, will not prevent a levy, for it is no contempt of the court nor interference with its order, to make the levy. (*Albany City Bank agt. Schermerhorn*, 10 Paige, 263.)

5. It has been abundantly decided, that the creditors of a partnership have no general lien on the assets, unless the agreement of dissolution, or the decree of the court, creates a lien, and even then, it is said to be not a lien of the creditors, but the equities of the partners to have the property applied in payment the firm debts.

No such decree could be made in this action. (*Ex parte Ruffin*, 6 Ves. Jr., 126; *Ex Parte Williams*, 11 id. 5.)

6. The creditors cannot be prevented from pursuing their legal remedies, and acquiring a lien by judgment and execu-

tion, by the commencement of a suit between the partners, and the appointment of a receiver in such suit.

(1.) For the partners have the control of the suit, and the creditors are not parties before decree. (*Innes agt. Lansing*, 7 *Paige Rep.* 583.)

(2.) To say that the receiver's possession prevented the creditors from pursuing their legal remedies, is to give power to partners to put their creditors at defiance. Partners may always, when pressed, contrive a quarrel, and resort to a suit and a receiver.

7. This form of action between partners is analogous to the old equity action, against executors for an account and distribution, and in such case any creditor could always acquire a priority by judgment, and execution before decree. (*Largan agt. Bowen*, 1 *Scho. & LeF. Rep.* 299; *Thompson agt. Brown*, 4 *J. Ch. Rep.* 631, 642, 643, 639, *et seq.*)

The case of a partner filing his bill against his copartner for an account, and for an equal and rateable distribution of the assets among all the creditors, is not distinguishable in principle from the case of a bill against executors for an account and distribution, and it was always held in such case, that after a bill filed and before decree, the executor might confess a judgment which would have priority. (*Smith agt. Eyles*, 2 *Atk.* 385; *Poony agt. Phelps*, 10 *Vesey*, 34; *Thompson agt. Brown*, 4 *J. C. R.* 636.)

8. The precise point in question, *i. e.* that the receivership in a partner's suit, is no bar to a creditor before decree, was decided in *Pratt agt. Robinson*, and in *Waring agt. Robinson*, (1 *Hoff. Ch. Rep.* 524.) (*See also 2 Duer's Rep.* 685.)

HILTON, Judge. Where a copartnership has become insolvent, no doubt can exist as to the power of a court of equity, upon the application of either partner by a proper complaint, to appoint a receiver to take charge of all the partnership assets, and close up its affairs. (*Adams' Doctrine of Equity*, 241, 243; *Story's Eq. Jur.*, §§ 672, 673; *Law agt. Ford*, 2 *Paige*, 310; *Egberts agt. Wood*, 5 *id.* 517, 525; *Story*

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on *Part.* §§ 228, 229; *Hitchcock* agt. *St. John*, 1 *Hoff. R.* 501; *Martin* agt. *Van Schaick*, 4 *Paige*, 479.)

The motion, therefore, presents the question, whether the execution and delivery of the assignment so made by the defendants Schlieper and Haarhaus, purporting to convey and transfer all the partnership assets to the defendant Bohnstedt in trust for the creditors of the firm, can be considered as an impediment to the exercise of this power of the court, and prevent its granting the plaintiff the relief he asks. During the existence of a partnership, each partner is clothed with, and possesses an equal and general power and authority, in behalf of the firm, to sell, loan, pledge, dispose of its effects and property in any manner within the objects of the partnership, or necessary or proper in the ordinary prosecution of its business.

By the act of copartnership, each partner has these powers communicated to him, but they are personal to himself, and cannot be delegated to another without the assent or concurrence of his copartners. (3 *Kent's Com.* 40; *Story on Part.* §§ 101, 102; *Collyer on Part.* § 384; *Egberts* agt. *Wood*, 3 *Paige*, 517, 525; *Havens* agt. *Hussey*, 5 *id.* 30; *Fisher* agt. *Murray*, 1 *E. D. Smith*, 341; *Mabbett* agt. *White*, 2 *Kern.* 442.)

No other powers should be implied except such as are sanctioned by the usage of the trade or business in which they may be engaged. (*Hays* agt. *Heyer*, 3 *Sand. S. C. R.* 297; *Hitchcock* agt. *St. John*, 1 *Hoff. Ch. R.* 511; *Fisher* agt. *Murray*, 1 *E. D. Smith*, 341, 343.)

Upon these views of the powers of each partner, it has been frequently decided that an assignment made to a trustee of all the partnership assets, for the benefit of the creditors of the firm, but giving preferences to certain creditors over others, is void, unless made with the assent or concurrence of all the copartners; upon the ground that authority to make such an instrument is not implied by the act of copartnership or the copartnership relation, and consequently cannot be inferred or presumed. (*Anderson* agt. *Tompkins*, 1 *Brock. Rep.* 456; *Harrison* agt. *Story*, 3 *Cranch Rep.* 289; *Havens* agt. *Hussey*, 5

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Paige, 30; *Deming* agt. *Colt*, 3 *Sand. S. C.* 284; *Fisher* agt. *Murray*, 1 *E. D. Smith*, 341; *Kemp* agt. *Carnly*, 3 *Duer*, 1; *Haggerty* agt. *Granger*, 15 *How. Pr. R.* 248; *Everson* agt. *Gehrman*, 10 *How. Pr. R.* 301; *Dana* agt. *Lull*, 17 *Vermont*, 390.)

Now if the power does not exist in any number of partners less than the whole to make such an assignment giving preferences, by what process of reasoning can it be determined that any one partner can vest the entire partnership assets in a trustee by an assignment, as in this case, without preferences?

By either assignment, the whole property of the firm is wrested from the non-concurring partners, against their will, placed in the possession and under the sole control of a trustee, in whose selection they have had no voice, the business of the firm wholly suspended, and the copartnership itself virtually dissolved. A careful examination of the elementary books treating of the law of partnerships, and of the decisions cited, fails to show that the power exists in either case.

Courts should not imply authority of this extraordinary character, unless the parties intended to grant it, and it never should be presumed, unless the evidence of such intention be express and positive.

Upon the views thus briefly stated, having arrived at the conclusion that the assignment by Schlieper and Haarhaus, without the assent or concurrence of the plaintiff, is absolutely void, and no obstacle in the way of granting the plaintiff the relief sought by him in this action, it follows a receiver must be appointed of all the property of the partnership of Wetter, Schlieper and Haarhaus, and the injunction now existing, continued until final judgment herein.

A reference to appoint said receiver will be taken to Hamilton W. Robinson, Esq., as referee.

Ordered accordingly.

SUPREME COURT.

WILLIAM LIVARD agt. JOSEPH B. MORRIS.

In an action to recover the possession of personal property, the decision was in favor of the defendant, who perfected judgment for the *value* of the property and for *damages* for taking and detaining it, and the *costs* of the action. On appeal, the general term decided that "the judgment be *reversed*, unless the defendant stipulated to collect only his damages for taking and detaining the property and costs, and if such stipulation be made, that then the judgment be affirmed."

The defendant served the required stipulation, and then entered up judgment for the *costs of the appeal*, (some \$84.)

Held, that upon such a state of facts, it would be more difficult to show that the plaintiff himself was not entitled to costs of the appeal against the defendant. The plaintiff had succeeded upon the appeal. The defendant should not be permitted to take the wind out of the plaintiff's sails under such an order. Judgment for costs of the appeal set aside, with costs of the motion.

Albany Special Term, July, 1857.

MOTION to set aside judgment for costs. The action was brought to recover the possession of personal property. Upon the trial, the decision was in favor of the defendant, who thereupon perfected judgment for the value of the property in question, and also for the damages for taking and detaining the property, and the costs of the action. From this judgment the plaintiff appealed to the general term. The decision upon the appeal was, that the judgment be *reversed*, unless the defendant stipulate to collect only his damages for taking and detaining the property and costs, and if such stipulation be made, that then the judgment be affirmed.

The defendant served a stipulation, pursuant to the terms of the order, and then proceeded to enter up judgment for the costs of the appeal, which were taxed by the clerk at \$84.44. This judgment the plaintiff moved to set aside.

LYMAN TREMAIN, *for plaintiff.*

JOHN K. PORTER, *for defendant.*

Livard agt. Morris.

HARRIS, Justice. The decision at the general term was in favor of the plaintiff. It was held that the judgment appealed from was erroneous, and could not stand. The order of the court accordingly was, that it should be *reversed*. But the court were also of opinion that though the judgment, as it had been perfected, was erroneous, yet the defendant was entitled to recover a judgment for a part of the demand. To save him the expense and inconvenience of entering up a new judgment, it was made a part of the order that notwithstanding the decision that the judgment should be reversed, it might yet stand as a valid judgment, if the defendant, by stipulation, would give the plaintiff the benefit of the decision in his favor. He was accordingly required to agree, that he would only collect upon the judgment, as the condition upon which it should be allowed to stand, the damages mentioned in the judgment, and the costs. A fair construction of such an agreement would, I think, exclude the costs of the appeal. It is evident that the court intended the defendant, if he would take the benefit of the condition in the rule, should waive his right to any other costs than those embraced in the judgment.

Upon such a state of facts, it would be more difficult to show that the plaintiff himself was not entitled to costs against the defendant. He had succeeded upon the appeal. Judgment of reversal had been pronounced. He might well urge that the fruits of his victory should be awarded to him. It was matter of favor to the defendant, not of right, that any part of his judgment should be allowed to stand. It is certainly enough for the defendant, that by allowing him this favor he escapes the costs of a reversal, with which he must otherwise have been charged. The injustice of allowing him to recover of the plaintiff the costs of the appeal, is too palpable to be tolerated. The judgment which the defendant has entered for such costs, must be set aside. I think, too, the defendant should be charged with the costs of this motion.

SUPREME COURT.

JOHN CORNELL agt. ISAAC L. POTTER and JACOB B. POTTER.

A party to an action who testifies as a witness in his own behalf, under section 399 of the Code, is not entitled to fees as a witness. His character as a party, should prevent him recovering fees as a witness against his adversary.

A witness, within the meaning of the act of 1840, (which still governs the fees, &c., of witnesses,) is a person whose attendance at the trial cannot be compelled, except by serving a subpoena on him and paying him, or tendering him his fees as such.

A party to an action, cannot pay, or become liable to pay, fees to himself, for attending the trial as a witness; and a charge by a party for fees as a witness, for attending the trial and testifying in his own behalf, cannot be properly denominated (what witnesses' fees are,) a disbursement. (*Held, that the case of Querissle agt. Hiliard, (3 Abbott, 31,) so far as it conflicts with these views, should not be followed.*)

Chemung Special Term, February, 1858.

MOTION by defendants for a re-adjustment of their costs in the action.

The action was tried at the Tioga circuit, in December, 1857, when the jury found a verdict for the defendants.

More than ten days before the trial, the attorneys made a stipulation, to the effect that the parties might be examined, without notice, as witnesses, in their own behalf, before the jury; and upon the trial the defendants were examined as witnesses for themselves, under section 399 of the Code, as amended by the act of April 13th, 1857. They answered separately, but the motion papers did not show the nature of the action, or that either defendant had a separate defence.

The defendants presented their bill of costs to the clerk of Tioga county, with an affidavit that they attended the trial of the action as necessary and material witnesses for each other as well as for themselves; and they swore that each gave evidence for his co-defendant as well as for himself.

Their fees as witnesses amounted to \$9.92. The plaintiff objected to the allowance of these fees to the defendants, by

Cornell agt. Pottera

the clerk, and he presented an affidavit made by one of his attorneys, showing that the evidence of the defendants was taken, not in behalf of each other, but for and in behalf of themselves; and that the evidence of each was taken in his own behalf, and not simply in favor of his co-defendant.

The clerk disallowed the defendants' charges for fees as witnesses, and struck the same out of the bill of costs. The defendants made a motion for a re-adjustment of their costs; and insisted that they were entitled to fees as witnesses, notwithstanding the fact that they were parties to the action.

DAVIS & BROWN, *for plaintiff.*

TRACY & WALKER, *for defendants.*

BALCOM, Justice. The only question to be decided on this motion is, whether the clerk should have allowed the defendants fees *as witnesses*, on the adjustment of their costs, in the action against the plaintiff, for attending the trial, and being examined as witnesses in their own behalf.

The fees of witnesses were prescribed by chapter 386 of the Laws of 1840, and they have since remained unaltered. Section eight of that chapter is in these words, viz: "Fees of witnesses: For each witness fifty cents, for each day while attending any court or officer, and if the witness resides more than three miles from the place of attendance, travelling fees at the rate of four cents per mile, going and returning." (*Laws of 1840, p. 331.*) When this statute was enacted, a party could not be called as a witness by his adversary, except to testify in cases in which the defence of usury was interposed; and parties to actions could not then testify at all for themselves.

The language of section 399 of the Code, so far as it is applicable to the question now presented, is, that "a party to an action or proceeding, may be examined *as a witness* in his own behalf, *the same as any other witness.*" But neither that section, nor any other, contains any provision that allows a party fees as a witness, for attending a trial and testifying in his own behalf. If a party can recover fees, as a witness, of his adver-

sary, when he testifies and beats his adversary in an action, the above-mentioned section of the Code must make him a witness, when he is examined in his own behalf, within the meaning of the act of 1840.

It would be absurd for a party to take out a subpoena for himself, or have one served on himself, requiring him to appear and testify on the trial of his own action, in his own behalf. A witness within the meaning of the act of 1840, is a person whose attendance at the trial cannot be *compelled*, except by serving a subpoena on him, and paying him or tendering him his fees as such.

Section 399 of the Code would be as effectual and as sensible if its language was, that "a party to an action or proceeding, may testify in his own behalf, touching all matters in dispute therein." The words, that he may be examined "as a witness in his own behalf, the same as any other witness," do not divest him of his character as a party, but only show that he may testify in person, instead of procuring witnesses to do it for him. He is yet a party while acting as a witness. And I think his character as a party should prevent him recovering fees as a witness against his adversary.

It would be useless to lay down a rule that a party can recover fees as a witness, when he attends as such, and not when he attends as a party, although examined as a witness in his own behalf; for parties would be informed of the rule, and attend as witnesses, or would generally swear they attended as such.

I am of the opinion that the provision is a wise one, which allows parties to actions and proceedings, to testify for themselves; but I also think they should not be encouraged, or even tempted, to take the place of witnesses, in cases in which there is no necessity for them to do so, by giving them fees as witnesses, when they testify for themselves, in actions wherein they succeed.

Witnesses' fees are disbursements; and disbursements are expenses paid or incurred by a party or his attorney, in the progress of an action, for postage and printing, the fees of offi-

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cers and witnesses. A party to an action cannot pay or become liable to pay fees to himself, for attending the trial thereof as a witness; and a charge by a party for fees as a witness, for attending the trial of an action and testifying in his own behalf, cannot be properly denominated a disbursement.

The conclusion to which I have come is, that the clerk did right in rejecting the charges of the defendants for fees as witnesses for themselves in the action. This conclusion is sustained by the following authorities: *Christy* agt. *Christy*, (6 *Paige Ch. R.* 170;) *Perry* agt. *Livingston*, (6 *How. Pr. R.* 404;) *Logan* agt. *Thomas*, (11 *id.* 160;) and I think the case of *Querissle* agt. *Hilliard*, (3 *Abbott*, 31,) so far as it conflicts with the above conclusion, should not be followed.

The defendants' motion for a re-adjustment of their costs, must be denied, with \$10 costs,

SUPERIOR COURT.

LAUGHRAN & DILLON agt. ORSER, Sheriff.

If an action be brought in a court of record against a sheriff for not returning an execution, and the plaintiff recovers less than \$50 damages, he must pay the costs of the action. It is not one of the actions of which, according to section 54 of the Code, a justice of the peace has no jurisdiction. This result must follow even if it be conceded that section 53 is not sufficiently comprehensive to confer jurisdiction of such an action on a justice. Subdivision 3 of section 304, cannot be construed as referring to section 53, as well as to section 54.

Section 53 does not grant jurisdiction of any action in which the amount *claimed* exceeds \$100. Section 304 does not permit the amount *claimed* to affect the question of liability for costs, but only the amount recovered, unless the action be one of those enumerated in section 54, or one of those in which, by sub. 4 of section 304, a party recovering less than \$50, will recover as much costs as damages.

February 27th, 1858.

Before BOSWORTH, HOFFMAN, WOODRUFF and PIERREPONT,
Justices.

Langhran & Dillon agt. Orser.

THIS action comes before the court, on an appeal from an order made by Mr. Justice PIERREPONT, declaring that the clerk erred in adjusting the costs of the action in favor of the plaintiffs, and directing that the clerk adjust defendant's costs of the action and insert them in the entry of judgment in the judgment roll.

The complaint shows that the plaintiffs recovered judgment in the supreme court, against one Ricius N. Hurley, for \$811.66, on which an execution was issued against his property and delivered to the defendant to be executed, he being then sheriff of the city and county of New-York. That an attachment was issued in that action, soon after it was commenced, against the property of said Hurley, and delivered to the defendant as such sheriff, to be executed. That said Hurley had sufficient property, liable to be attached, to satisfy the judgment, and the defendant, although required to levy upon it and indemnified for so doing, did not attach and retain enough of the property for that purpose, but conducted himself so negligently and carelessly in that behalf, that only \$49, applicable to the payment of the judgment, was made out of the property, and although often required, had neglected and refused to return the execution.

The action being at issue on questions of fact, was referred to E. P. Cowles, as referee. The referee decided that no part of the property which the plaintiffs insisted it was the duty of the sheriff to attach and levy upon, was the property of said Hurley, and also decided all the issues in favor of the sheriff, except that he was in default, in not having returned the execution, and for such default, assessed the plaintiffs' damages at six cents. The question presented by the appeal is, which party is entitled to recover the costs of the action?

E. MORE, *for plaintiffs and appellants.*

A. J. VANDERPOEL, *for defendant and respondent.*

By the court—BOSWORTH, Justice. This is an action for the recovery of money, and the plaintiffs have recovered but

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six cents. By sub. 4 of § 304 of the Code, they are not entitled to costs, unless the action be one, "of which according to section 54, a court of a justice of the peace has no jurisdiction." (Section 304, sub. 3.)

It is not one of the actions of which section 54 declares that no justice of the peace shall have jurisdiction. The mere statement of these provisions shows that the plaintiffs are not entitled to costs, unless there are other statutes modifying the natural and obvious import of the provisions already cited. Section 305 declares that costs shall be allowed of course, to the defendant, in the actions mentioned in § 304, unless the plaintiff be entitled to costs therein.

The appellants' counsel insists that sections 53 and 54 of the Code, are so connected, that a reference to the latter by section 304, should be construed as a reference to both sections; and that if a just construction of section 53, requires the court to hold that section 53 does not grant jurisdiction of an action like the present, it would be absurd to so construe these statutes as to declare that they require an injured party to sue in a court of record, in a case like the present, or submit to the loss, to which a neglect of official duty, by a sheriff, has subjected him, or pay the costs of the action unless he recovers \$50 or more, when suing in the only court in which by law he can sue, notwithstanding he may recover a sum less than \$50. But in order to give any point to this argument, it must be assumed or held that section 53 does not confer, on a justice of the peace, jurisdiction of such an action. If it does, the plaintiffs are clearly liable to pay costs, because jurisdiction of it is not prohibited by section 54.

But the reference by section 304, to section 54, cannot be construed to contain, by implication or fair construction, a reference to section 53 also. Section 53 is the one which confers jurisdiction. And however general the class of actions of which it gives jurisdiction, yet in no case does it give jurisdiction of any action, in which the amount *claimed* exceeds \$100. Section 54, which denies jurisdiction of the actions it enumerates, does so with reference to the *nature* of the actions,

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and not with reference to the amount that may be claimed, with two exceptions; one being actions in which the people of the state are a party, and for penalties not exceeding \$100, and the other a matter of account where the sum total of the accounts of both parties, established at the trial, shall exceed \$400. (*Sec. 54; Stillwell agt. Staples, 5 Duer, 691.*)

If section 304, in its reference to section 54, should be construed as referring with equal directness to section 53, it would follow that a plaintiff in all actions, might sue in a court of record, and claim damages exceeding \$100; and if he recovered any amount, he would recover costs, because under such a construction the action would be one of which, according to section 54, a justice of the peace had no jurisdiction, for the reason that the damages claimed exceeded \$100, and, therefore, under section 53, a justice had no jurisdiction. Such a construction is wholly inadmissible.

But it does not follow that because section 53 does not grant jurisdiction, it would convict the legislature of enacting an absurdity to hold that a plaintiff in such a case, under the various provisions of section 304, and under section 305, must pay costs, in a case like the present.

The legislature has enacted that in an action for assault, battery, false imprisonment, libel, slander, malicious prosecution, criminal conversation, or seduction, the plaintiff shall recover no more costs than damages, if the damages recovered are less than \$50. All of these actions are to recover damages for the invasion of rights, as to which all persons, as a general rule, are most sensitive. Section 54 prohibits a justice of the peace from taking jurisdiction of either of them. Under the Revised Statutes, if either of these actions, except those for criminal conversation or seduction, were brought in a court of common pleas, the plaintiff, if he recovered any damages, recovered the costs of that court. (2 R. S. 614, § 12.)

The change made by the Code, in the law relating to this subject, indicates that the legislature was of the opinion that no considerations of public policy required that a defendant in such cases, though technically in the wrong, should be pun-

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ished with the full costs of an action, in any court of record, unless the damage done amounted to \$50.

In a case like the present, it would be no justification for departing from the plain reading of the statute, to say that it is absurd to suppose that the legislature would deliberately and understandingly subject a plaintiff to the costs of an action against a sheriff for a breach of official duty, even though the resulting damages should be but six cents.

The right to sue in a court of record is undoubted. But if a plaintiff elects to sue, in every case in which he can establish a right of action entitling himself to nominal damages, it does not follow that those provisions of law, which subject him to the payment of costs when only nominal damages are recovered, are so clearly absurd, that on that ground and for that reason, the courts may legislate and declare their meaning to be variant from their clear and obvious import.

Even if it be conceded that section 53 does not grant jurisdiction of such an action, a plaintiff in an execution, who has sustained damages, to an amount that would exempt an action to recover them from the imputation of being a vexatious suit, is not remediless. The sheriff may be compelled by attachment to return an execution.

If his return is false, and if his official default or misconduct shall have caused injury to a plaintiff in the execution, permission will be granted to prosecute his official bond. (2 *R. S.* 476, *title* 5.) That may, and probably must be, prosecuted in the name of the people of this state. (*Id.* 476, § 2, and *Vol. II*, 4th ed. 719, § 3.) Of such an action, a justice of the peace, according to section 54, has no jurisdiction, it not being for a penalty. It not only may, but must be brought in the name of the people, unless the provisions of the Revised Statutes have been so modified by the Code, as to require such suits to be brought in the name of the actual party in interest. (*Code*, § 291.)

But we should not feel at liberty to construe the provisions of section 304, contrary to their clear meaning, even if that construction would deny to the plaintiffs a right to bring this

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action in a justice's court, and compel him to pay the costs of it, when brought in the only court in which, by law, it could be brought.

Entertaining these views, it becomes unnecessary to express an opinion whether a justice of the peace, under section 53 of the Code, has jurisdiction of such an action or not. The order appealed from, must be affirmed, with \$10 costs.

SUPREME COURT.

WILLIAM BREWER agt. HARVEY TEMPLE.

Where the plaintiff alleged in his complaint facts which would, if established upon the trial, have sustained an action for *assault and battery*; and also alleged what was said by the defendant at the time, which would, if established upon the trial, have sustained an action of *slander*,

Held, on demurrer to the complaint, on the ground that two causes of action were improperly united, that the complaint purported to give the history of one occurrence, and no more. The whole together, of what was said and done, constituted but a single transaction, and made but a single cause of action [*This case would seem to come strictly within the provisions of the Code, requiring a statement of facts constituting a cause of action, without any name for the action. If a name was required, it might be difficult to find one appropriate; for an ACTION ON THE CASE would hardly suit facts constituting assault and battery, or allegations constituting slander.*—REPORTER.]

Albany Special Term, March, 1857.

DEMURRER to complaint.

The complaint alleges that on the first day of November, 1856, the defendant, with loud, boisterous and abusive language, made an assault upon the plaintiff, and seized him by the body, neck and throat, and jammed and squeezed his throat, and then and there *published and declared*, in the presence and hearing of divers good and worthy citizens, of and concerning the plaintiff, these words: "you perjured yourself, and I will send you to the states prison," and then and there pushed and jammed about the plaintiff; whereby the plaintiff was greatly

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injured in his person, character, feelings and circumstances, and the plaintiff, therefore, demanded judgment.

The defendant demurred to the complaint, on the ground that two causes of action, one for assault and battery, and the other for slander, were improperly united.

J. PERCY, *for plaintiff.*

C. W. MINK, *for defendant.*

HARRIS, Justice. I think the demurrer is not well taken. The complaint in fact, contains but a single cause of action. The allegations relate to a single transaction. The complaint purports to give the history of one occurrence, and no more. This history embraces what was done and what was said upon the occasion. Each constitutes a part of the *res gestæ*. What is alleged to have been done, would, if established upon the trial, sustain an action for personal injury. What is alleged to have been said, would, if established upon the trial, sustain an action for injury to the reputation. The whole together, constituting as it does but a single transaction, makes but a single cause of action. The plaintiff brings his action upon the whole case, to recover damages for the compound injury he has sustained. The facts are no more divisible into two causes of action than they would be if the plaintiff had alleged that the defendant had spit in his face, and then knocked him down—or, having knocked him down, that he afterwards seized him, and tore his coat. However numerous the blows, or various the injuries, the whole constitute but a single cause of action. When it comes to trial, all that was said and all that was done, become the proper subject of investigation, and a single verdict adjusts the rights of the parties. The defendant, therefore, is not so badly off as his counsel supposes. The plaintiff has but a single cause of action against him. One trial will dispose of the whole matter. The demurrer must, therefore, be overruled, but with liberty to the defendant to answer the complaint within twenty days after payment of the costs of the demurrer to be taxed by the clerk of Albany.

White agt. The Hudson River Insurance Company.

SUPREME COURT.

EDWARD WHITE agt. THE HUDSON RIVER INSURANCE
COMPANY.

Policies of insurance should be construed liberally, for the interest alike of both parties.

New - York Special Term, October, 1854.

ROOSEVELT, Justice. Policies of insurance, where there has been no fraud, and no misrepresentation or concealment of any circumstance materially enhancing the risk, are to be construed liberally. Technical objections involving no substantial right, are to be overlooked. While the underwriter fairly receives his premium, the insured should as fairly receive his protection. It is the interest alike of both, that the business of insurance should be conducted—and should be universally understood to be conducted—upon the broadest principles of fair and liberal dealing, never strangling justice in the nets of form.

Judgment for plaintiff.

ERRATUM.

In the case of *Dresser agt. Van Pel & Wicker*, page 26, an error occurs in the 3d paragraph and 3d line from the bottom, where it reads, "at special term and not at chambers." It should read, "at special term and at chambers." The word "not," should be out of the sentence.

Pattison agt. Johnson.

SUPREME COURT.

AMBROSE PATTISON agt. BENJAMIN B. JOHNSON.

The notice required to be given of the examination of a party or person as a witness, under § 399 of the Code, must designate and specify distinctly the points upon which such examination is intended to be had. The notice should certainly be as clear and as definite as is required in a bill of particulars.

A notice of this kind: "The defendant will be examined as a witness on the trial of this action in his own behalf on each and every allegation contained in, and fact put in issue by the pleadings therein," held, entirely insufficient. No points are specified in such a notice.

Erie Special Term, November, 1857.

MOTION for new trial upon exceptions.

The action is upon a note. It is alleged in the complaint that the defendant made the note payable to the order of one Jesse Pattison, on or before the first day of January, 1857; that Jesse Pattison indorsed the note to the plaintiff; that defendant has not paid the note, &c. The defendant by answer denied each and every allegation in the complaint; and for a second answer, alleged that he gave a note, describing it as described in the complaint, except that it was payable at the house of the defendant, and averred that it was the same note mentioned in the complaint. He then avers that when the note became due, he was at the place where payable, ready and willing to pay the same, and has been ever since, and still is ready to pay, &c. Upon the trial, the plaintiff gave evidence tending to prove the issues upon his part, and rested. The defendant then offered himself a witness in his own behalf. The plaintiff objected, on the ground that no notice of his intended examination had been given. The defendant's counsel then produced, proved the service of, and read a notice, that the defendant "will be examined as a witness on the trial of this action, in his own behalf, on each and every allegation contained in, and fact put at issue by the pleadings therein."

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The plaintiff objected to the examination of the defendant as a witness, upon the ground that the notice did not specify the points upon which it was intended to examine the defendant. The court overruled the objection, and the plaintiff excepted. The defendant was examined as a witness, and proved the new matter alleged in his second answer, and the court directed a verdict for the defendant. The money had been brought into court soon after the action was commenced, and the plaintiff had received it.

G. PARSONS, *for plaintiff.*

J. GANSON, *for defendant.*

MARVIN, Justice. I think the judge erred in holding the notice sufficiently specific. The Code requires a notice of the examination, "specifying the points upon which such party or person is intended to be examined," and prohibits the examination, unless such notice be given. (*Code*, § 399.) The defendant in his notice says, that he will be examined as a witness in his own behalf, on each and every allegation contained in, and fact put at issue by the pleadings. Are any *points*, upon which he intends to be examined, *specified* in this notice? It seems to me not. It is argued that the allegations contained in the pleadings are specific, and that the facts put in issue are specific, and that a reference to them in the notice, makes the notice sufficiently specific. The allegations in pleadings, and the facts put in issue, are always specific, or should be, and if the argument of the defendant's counsel is sound, a notice in the form used in this case, will be sufficient in any and all cases. In the present case, there are numerous material allegations in the complaint put in issue by the defendant's general denial, and then there are several material allegations in the answer, alleging new matter. The defendant was examined touching the new matter in his answer, but if the notice was sufficient, he could as well have been examined touching the making of the note, its indorsement by Jesse Pattison, or any fact put in issue. In truth, the notice gave no more informa-

tion to the plaintiff than it would have given, had it simply stated an intention to examine the defendant generally, as a witness in the cause, in his own behalf. It is practically quite as indifferent as was the notice in *Falon* agt. *Keese*, (8 *Howard Pr. R.* 341,) and less definite than in *Benham* agt. *The N. Y. Central R. R. Co.*, (13 *How.* 198.) In the latter case, the notice did specify that the assignor would be examined as a witness on the part of the plaintiff, *as to the liability of the defendants*, and also generally as a witness in the action. The notice must specify the *points* upon which the party or person is intended to be examined. The Code does not say, the allegations contained in the pleadings, or the facts put in issue, but the *points* upon which the party is to be examined. The party, in his notice, should name or designate the points. Webster defines "the point" thus: "The subject, the main question, the precise thing to be considered, determined or accomplished." Counsel make *points*, presenting the precise question to be considered and decided.

There is no difficulty in practice in *specifying the points* upon which it is intended to examine the witness, and it is important to the adverse party that he should be informed of the subject or question in reference to which the examination is to be made. The notice should certainly be as clear and as definite as is required in a bill of particulars.

In my opinion, the notice in the present case, did not specify the points upon which it was intended to examine the defendant, within the true intent and meaning of the Code, and the defendant should not have been examined as a witness in his own behalf. New trial granted, with \$10 costs, to abide the event.

SUPREME COURT.

ELIJAH T. GRANT and others agt. A. VAN EPPS HOTCHKISS.

If the contract of a *surety* imports anything more than a liability *accessory*, or *collateral* to that of another person, he becomes a principal debtor.

But the contract of a surety may be for the payment of the debt, when it becomes due; or it may only amount to an assurance that the principal debtor is solvent; and that the demand can be enforced against him. In the one case the surety is liable at once, on the failure of the principal to satisfy the demand; in the other, he is liable only when the necessary legal means of enforcing compliance against the principal, have been exhausted; or at least on proving by legal evidence that he was not solvent.

To determine to which class any *guaranty* belongs, depends of course, upon the construction of the language employed.

The language of the guaranty in this case is as follows: "All drafts drawn by George C. Hotchkiss will be duly honored and paid by me, should he meet with any misfortune that he will not be able to do it himself."

Held, that this was not an assurance that George C. Hotchkiss was then a solvent person, and that he was *good* for the amount, but a promise that if he should not be able to pay it, that the defendant would. It was not, therefore, necessary for the plaintiff to prove that he had exhausted his remedy against George C. Hotchkiss; it was only necessary to show that the drafts had not been paid when they became due. "Misfortune" comprehends any cause which may prevent the principal from paying the debt.

Held, also, that both the circumstances and the contract constitute in the present case, a full and perfect *consideration*, and are distinctly set forth in the complaint.

New-York Special Term, April, 1857.

DEMURRER to complaint.

PLATT, GERARD & BUCKLEY, *for plaintiffs.*

HOMER H. STUART, *for defendant.*

CLERKE, Justice. Every obligation of a surety is a liability, accessory or collateral to that of another person. Under no form of expression can it be anything else; if the contract imports more than this, he becomes a principal debtor. But the contract of a surety may be for the payment of the

debt, when it becomes due; or it may only amount to an assurance, that the principal debtor is solvent, and that the demand can be enforced against him. In the one case, the surety is liable at once on the failure of the principal to satisfy the demand; in the other, he is liable only when the necessary legal means of enforcing compliance against the principal, have been exhausted; or at least, on proving by legal evidence, that he was not solvent. To determine to which class any guaranty belongs, depends, of course, upon the construction of the language employed. The guaranty, mentioned in *Curtis agt. Smallman*, (14 Wend. 231,) is in these terms: "I warrant the note good;" and it was decided, in that case, to be a guaranty that the note was collectible, and not that it would be paid on demand. This was deemed to be the ordinary popular signification of the phrase.

The language of the guaranty before me, is in these words: "all drafts drawn by George C. Hotchkiss will be duly honored and paid by me, should he meet with any misfortune that he will not be able to do it himself." This is not an assurance that George C. Hotchkiss was then a solvent person, and that he was "good" for the amount, but a promise if he should not pay it, that the defendant would; it does not warrant the solvency of the principal, but guarantees the payment of the debt. It says nothing, or imports nothing at all, of the then present ability of George C. Hotchkiss, but expressly stipulates the payment of the debt in his stead, if, from misfortune, he should not be able, in his own person, to satisfy the demand. This may be a slender, perhaps an imaginary, distinction; but it is one evidently recognized in our law. This word "misfortune" comprehends any cause which may prevent the principal from paying the debt. The defendant, in short, undertook to pay the amount of the drafts, if the principal should not be able to do it himself. It was not, therefore, necessary for the plaintiff to prove that he had exhausted his remedy against George C. Hotchkiss; it was only necessary to show that the drafts had not been paid, when they became due.

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The next objection is, that the guaranty does not sufficiently state a consideration. The complaint, in substance, states that the defendant, in August, 1855, introduced George C. Hotchkiss to the plaintiffs, and solicited them to permit the said George to make drafts on them on wheat, which he proposed to consign to the plaintiffs in New-York, to sell for him on commission; that for the purpose of securing the plaintiffs, the defendant addressed a letter to them, containing the words which I have already quoted. It is contended that this case comes within the decision of *Brewster agt. Silence*, (4 *Selden*, 207;) but it may, with much greater truth, be insisted that it comes within the decision of the *The Union Bank agt. Coster's exrs.*, (3 *Comstock*, 204,) and the still more recent case of *Gates agt. McKee*, (3 *Kern*, 232.) The consideration in this last case is stated almost precisely in the same terms as the consideration in this guaranty. In the one, it is: "I will be responsible for what stock M. E. McKee has had or may want hereafter, to the amount of \$500;" in the case before us, the language is: "all drafts drawn by George C. Hotchkiss will be duly honored and paid by me," &c. The consideration in the one, is the stock to be delivered; in the other, money to be advanced on the drafts. In this case, the transaction set forth in the complaint, shows that the drafts were to be honored by the plaintiffs, on wheat to be consigned to them; and if there is anything ambiguous in the language of defendant's letter, according to well established principles, reiterated in the cases to which I have referred, "parol evidence of the circumstances under which the contract was made, may be given." Both the circumstances and the contract constitute, in the present case, a full and perfect consideration, and are distinctly set forth in the complaint. *Brewster agt. Silence* presented a guaranty, without stating, on its face, any consideration; and the question seemed to be, whether the note and guaranty should be treated as constituting one instrument. The court say, that the words "value received," would probably have sufficed; but, as the guaranty did not contain any such words, and as the note was treated as a distinct, pre

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existing, and separate instrument, it was held that as the contract of guaranty stated no consideration, or satisfactory reference to a consideration, it was void by the statute of frauds. There may be a conflict, in some respects, between this case and that of *Gates agt. McKee*, and of the *Union Bank agt. Coster's Exrs.*; but I have no hesitation in yielding my homage, if there is a conflict, to these cases in preference to that of *Brewster agt. Silence*.

Demurrer overruled with costs, with liberty to answer within twenty days on payment of the costs.

SUPREME COURT.

JAMES BILLINGS agt. ANDREW A. VANDERBREK.

In a case where the parties have referred their cause to a referee by a *written consent*, (the cause not being referable otherwise,) *it seems* that if the court have the power, they ought not to exercise it, of substituting a *new referee* without the *same consent* of the parties; unless, perhaps, in a case where the decision of the referee is reversed on questions of *fact* merely, and which facts will again have to be decided by him on a re-trial.

Where the decision of a referee is reversed entirely on questions of *law*, he has, on a re-trial merely to conform to the law of the case as declared by the court; and whether the facts are changed or not changed, and he has found no opinion that will interfere with his fair and impartial finding thereon as *res nova*, there is no ground for substituting a new referee.

But if the decision of the referee has been reversed alone upon the *facts*—if the new trial has been granted because his finding was against the weight of evidence, and a re-trial would call upon him to pass again upon the same evidence, and upon the same questions or points—it is proper to send the case to a new referee.

A referee should not allow any unfair advantages to be taken by one party over his adversary, or lend himself to either party.

In this case, *held*, that the decision of the referee in adjourning the cause, to give the defendant's attorney time to give the requisite notice for the examination of the defendant as a witness, was eminently proper under the circumstances, and did not afford any good ground of complaint or exception to the plaintiff.

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It is too late for a party to make application to change the referee after he has given notice and proceeded to the re-trial of the case on his part, before the referee.

Monroe Special Term, November, 1857.

MOTION to substitute referee. The action is brought upon a written contract for the sale of goods and chattels. The goods were tendered in pursuance of the contract, but were not delivered, and the action was to recover the value of the goods. The case was tried before a referee, who made a report in favor of the defendant, which, on appeal, was set aside by the court, upon technical grounds, and a new trial granted. The affidavits on this motion, show that the plaintiff's attorney applied to the referee to fix the time for the re-trial on the 9th of November instant, and the same was fixed for the 19th of the same month, and notice of trial, and also notice that plaintiff would be examined as a witness on his own behalf, served on the same day, at about 5 o'clock P.M., at Rochester. That the plaintiff's attorney immediately thereafter, left in the cars for Clarkson, his place of residence, eighteen miles from Rochester. That the defendant's attorney applied the next day, the 20th, to the plaintiff's attorney to receive cross notice of the examination of the defendant, as a witness in his own behalf, which was declined. That the parties appeared before the referee on the 19th, and the plaintiff's attorney moved on the trial of the cause, whereupon the defendant's attorney moved to adjourn the cause on affidavits of the facts, so as to give him time to give due notice of the examination of the defendant as a witness on such trial. That the referee granted such motion or decided to do so, upon which the plaintiff's attorney immediately countermanded the notice of trial, and soon after prepared and served the papers for this motion.

S. B. JEWETT, *for plaintiff.*

J. R. REQUA, *for defendant.*

By the court—E. DARWIN SMITH, Justice. This action was

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not referable under the statute, without the written consent of the parties. The affidavits show that it was referred upon such consent, and to a referee named by the plaintiff's attorney. In such a case, where the parties have practically selected their own tribunal, if the court has the power, I think it ought not to exercise it, of substituting a new referee without the *same consent* of the parties. But aside from this consideration, I do not think there is anything in this case to warrant any change of the referee by the court. By reference to the case reported in 23 *Barb.* 546, it does not appear that there was any particular dispute before the referee on the facts, and if it were otherwise, the finding on the facts by the referee, seems to have been in favor of the plaintiff, and according to the allegations of his complaint. The referee found against the plaintiff upon the *law*. And the court has granted a new trial on the ground that the referee erred in matters of law.

The referee on the re-trial, has merely to conform to the law of the case as declared by the court; and if the facts are changed, I do not see that he has formed any opinion that will interfere at all with his fair and impartial finding thereon as *res nova*. If the decision of the referee had been reversed upon the *facts*—if the new trial had been granted because his finding was against the weight of the evidence, and a re-trial would call upon him to pass again upon the same evidence and upon the same question or points—I should think proper to send the case to a new referee, and so far I concur in the decision of *Schemerhorn agt. Van Allen*, (13 *Howard*, 82.) So far as the referee on the trial of a cause stands in the place of the jury, I do not see why he is not obnoxious to the same objection on the score of bias or prepossession, which could be urged against a juror on the second trial of the same cause. The fact that a juror had once heard the evidence and had formed an opinion upon the merits of the case in this way, would be a good ground of principal challenge to a juror. And when a case is to be re-tried upon the merits and upon the same evidence adduced before, and the referee is committed in opinion upon such evidence, the case should go to a new referee. But I do not think

this objection a good one where the referee is overruled merely upon the law, and the decision of that question involves no prejudice or bias upon the facts of the case. On questions of law, judges and referees make frequent mistakes, and the more experience they have in judicial proceedings, the more conscious they are of their liability to error, and the more ready they are to mistrust their first impressions and take a pleasure in correcting the error. There doubtless is much diversity of character among referees, as among judges, in respect to the pertinacity with which they adhere to opinions once formed; but whatever may be the private opinion of a referee upon the *law* of a case, every member of the bar of sufficient standing to be designated a referee, will, I trust, so far respect himself and the court, and knows too well his duty, not faithfully to conform to its decisions on the trial of any cause which may be referred to him. Judges more or less, at every circuit held by them, try over causes where they have been overruled upon the law by the court of appeals or their brethren, and it would be quite extraordinary if a judge did not, in such a case, try it upon the law as thus settled, as fairly as any other judge; and so I think it ought to be with referees; and I cannot think it will be otherwise with the learned referee to whom this cause stands referred.

The decision of the referee in this case, in adjourning the cause to give the defendant's attorney time to give the requisite notice for the examination of the defendant as a witness, affords no ground of complaint or exception to the plaintiff. His decision was eminently proper under the circumstances. A referee should not allow any unfair advantage to be taken by one party over his adversary, or lend himself to either party. By the course of the plaintiff's attorney, in giving the notice of trial, and notice of the examination of his client as a witness at the latest period for such notice, and at such a time and manner as to preclude the defendant from giving cross notice to the like effect, the plaintiff would have had an unconscientious and unfair advantage, if he referee had gone on to trial on the 19th of November. The

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law allows the parties to be witnesses for themselves, and it is the duty of courts and referees, to administer and carry out its provisions fairly. The defendant's attorney could have no reason to have given this notice till the cause was noticed for trial, and he was apprised that the plaintiff proposed to offer himself as a witness in his own behalf; and if he acted with diligence upon receiving such notice, he ought not to be forced to trial till he could have time to give the proper notice to comply with the statute. Upon the whole, I can see no ground for changing the referee, and on conferring with my brother, STRONG, who examined the case more particularly, and wrote the opinion of the court, when the case was before the general term, he concurs with me in the opinion that there is nothing in the case to warrant such a change. But if the plaintiff desired to change the referee, this application should have been made before noticing, and proceeding to the re-trial of the case on his part. The motion is denied, with \$7 costs.

SUPERIOR COURT.

McALLISTER agt. POND and others.

In proceedings for the *discovery of books and papers*, (which is a summary, and in some respects an extraordinary remedy,) the court is to be governed by the principles and practice of the (late) court of chancery, in compelling discovery. So say the Revised Statutes, (2 R. S. 199, § 31.) In this respect, there is no reason to believe that the legislature intended to introduce any new rule, when the provisions of § 388 of the Code were enacted.

The rules of the court, (8, 9, 10, &c.,) contemplate the setting forth by *petition* of *facts and circumstances*, which show that the discovery is necessary, and that the party applying therefor is entitled to demand it of the adverse party. A mere statement that in the opinion of counsel the discovery sought is necessary, will not suffice. Such a statement is requisite, but it is *cumulative*.

One of the first facts which should appear on an application for a discovery of books and papers, for the purpose of preparing for trial, is, that the applicant has not in his possession the same information, or if he has, that he has not the means of establishing by other available proof the contents of such books or papers.

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In this case, it in no wise appeared by the petition that the plaintiff was ignorant of any particular which was necessary to enable him to prepare for trial, or which was contained in the books and papers sought to be produced. There was a failure to show a want of the requisite information to enable the plaintiff to prepare for trial. And it was not stated that the plaintiff had any need or the defendant's books and papers, for the purpose of establishing the particulars of the accounts between the parties; nor that he could not prove without the production sought, every fact which was material to his case.

And besides, it appeared that the books of the defendants, of which discovery was sought, had been freely offered to the plaintiff's attorney for examination and inspection, and he had omitted to avail himself of the opportunity. Motion denied.

New - York Special Term, March, 1858.

THE action is brought by the plaintiff as assignee of Samuel J. Clarke, surviving member of the firm of Clarke & Co., to recover an alleged balance of account due by the defendants to that firm.

The plaintiff presented his petition for a discovery, stating that Clarke & Co. were for many years large importers of West India produce, of which large amounts were sold by the defendants as agents of Clarke & Co., in the city of New-York; and that in other transactions Clarke & Co. were jointly interested with the defendants; and that in February, 1848, Clarke & Co. rendered to the defendants an account containing a statement of the balance then due to Clarke & Co.; and in February, 1849, a similar statement; and in 1853, a statement of account, embracing the same transactions, with some additional items, and showing a balance due from the defendants, of two or three thousand dollars.

That the defendants copied said statements into their books, and that Clarke & Co. either kept no copy, or none can now be found. That the partner of Clarke & Co., now surviving, had little or no personal knowledge of the transactions. That the defendants were merchants, keeping the usual books of accounts and files of papers, which are still in their possession. And that the books and papers of which discovery is sought, are not in the possession or control of the plaintiff. That all the books of the defendants contain entries involving the mer-

its of his action, and especially the copies of the said accounts rendered.

That the plaintiff is advised by his counsel that the accounts are material evidence on the trial, and that he cannot safely proceed without a discovery, &c. He therefore prays for such order as the court may think him entitled. The petition also stated the application by the attorney for the plaintiff, to the defendants' attorney, for a production of the books and some correspondence had between them on the subject.

The opposing affidavits relate chiefly to alleged rejected opportunities voluntarily given to the plaintiff to examine the defendants' books, at the office of one of the defendants; the bringing the books there for that purpose, and the neglect of the plaintiff or his counsel to make the examination.

MR. BLISS, *for the plaintiff, in support of the petition.*

EDWIN A. DOOLITTLE, *for the defendants, opposing.*

WOODRUFF, Justice. The Revised Statutes, in providing for the discovery of books and papers, direct that the court shall be governed by the principles and practice of the court of chancery, in compelling discovery. (2 Rev. Stat. 199, §§ 31, [22].) In *this respect*, there is no reason to believe that the legislature intended to introduce any new rule, when the provisions of § 388 of the Code were enacted. The discretion by that section confided to the court, or a justice thereof, is not a merely arbitrary discretion to be exercised in favor of the applicant as a matter of course. And the rules of court, (*Rules 8, 9, 10, &c.*), contemplate the setting forth by petition of *facts and circumstances*, which show that the discovery is necessary, and that the party applying therefor is entitled to demand it of the adverse party. A mere statement that in the opinion of counsel the discovery sought is necessary, will not suffice. Such a statement is requisite, but it is *cumulative*; it is in addition to a statement of the facts and circumstances upon which the discovery is claimed.

One of the first facts which should appear on an application

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for a discovery of books or papers, for the purpose of preparing for trial, is, that the applicant has not in his possession the same information, or if he has, that he has not the means of establishing by other available proof the contents of such books or papers.

If he has already in his possession all the details and particulars which would be furnished by the books and papers sought, there can be no necessity for asking their production, for the purpose of information; and if he can establish those details and particulars by other proof, there is no ground for requiring the adverse party to furnish such proof.

In the present case, it in no wise appears by the petition, that the plaintiff is ignorant of any particular which is necessary to enable him to prepare for trial, or which is contained in the books or papers sought to be produced; nor that the books and accounts of Clarke & Co., his assignors, do not contain every item of the accounts between them and the defendants, nor that *those* books and accounts, so far as they relate to the assigned claim, are not within the plaintiff's possession or control. So that there is a failure to show a want of the requisite information to enable the plaintiff to prepare for trial. And it is not stated that the plaintiff has any need of the defendant's books for the purpose of establishing the particulars of the accounts between the parties; nor that he cannot prove without the production sought, every fact which is material to his case. It is true that he states that the defendants' books and accounts are not in his possession nor under his control; but that is far short of showing that he has not all the information which their production would disclose, or the means of proving all the facts material to his case, without them. So it is also true that he states in relation to the accounts current, which the petition states were rendered by Clarke & Co. to the defendants, that no copy was retained, or no complete copy can now be found. But it is not shown how the production of these accounts rendered by the plaintiff's assignors, are necessary. It is not stated that the like accounts are not in the books of Clarke & Co., (not as copies, but as the very materials

from which the accounts rendered were made;) nor that there is any lack of proof of the items which compose such account nor of the fact that the account was rendered, if that fact be material—which, however, is not shown by any papers used on the present motion.

If I were at liberty to act upon anything not stated in the papers, I might suppose in relation to the account rendered, that it may be material to show that fact, in order to establish acquiescence and so prove an account stated between the parties; and if so, then on showing that the plaintiff had no means of establishing the contents of the account so rendered, but by compelling its production or by a discovery of the book in which the defendants have caused it to be transcribed, the plaintiffs may perhaps be entitled to an order for the production of the account, or such book, or both. But the papers before me do not show such a state of things.

I feel constrained to deny the present motion, because I do not think that the moving papers disclose a case requiring this summary, and in some respects extraordinary remedy.

There would otherwise be strong ground for hesitation, before granting an order for the production of the *books* of the defendants, in the fact that those books have, according to the affidavits, been freely offered to the plaintiff's attorney, for examination and inspection, and he has omitted to avail himself of the opportunity. Had he gone to the counting-room or office of the defendant, and examined the books, it would seem upon the affidavits now before me, that he might have inspected and taken copies of everything material to his purpose.

The motion must, for the present, be denied. The defendants' costs of motion, \$10, may abide the event of the suit. But the plaintiff may have leave to renew the application upon further or other papers, if so advised.

Proude agt. Whiton.

SUPREME COURT.

JOSEPH PROUDE agt. JOHN L. WHITON, Ex'r, &c.

Where a creditor holds a claim against executors or administrators, and desires a reference under the statute, he must first move on the subject of the reference. Neither party is bound to refer, and if either desires a reference, he must offer to refer. The executor or administrator cannot be said to *refuse* until the claimant in some way manifests his willingness to refer.

An unqualified rejection of the claim, unaccompanied with an offer to refer, is not equivalent to a refusal to refer. (*The contrary of this was held in Fort agt. Gooding*, 9 Barb. 394.) A neglect to answer an offer or proposition to refer, may be deemed a refusal.

At Chambers, by consent of counsel, Penn Yan, May 30, 1856.

MOTION on report of referee, pleadings and affidavits, by plaintiff, on a claim against executors, that judgment be entered on the report *with costs*, and by defendant that referee make a further report.

A. V. HARPENDING, *for plaintiff*.

H. A. DOWE, *for defendant*.

WELLES, Justice. Both motions must be denied. It does not appear that the plaintiff ever requested a reference under the statute before action brought, nor that the defendant ever refused such reference. The defendant positively denies in his affidavit, that any one ever proposed a reference, or that he ever refused to consent to one.

There must be a *refusal* or something equivalent. Neither appears in this case. A neglect to answer an offer or proposition to refer, may be deemed a refusal, but the creditor must first move on the subject of the reference. In *Fort agt. Gooding*, (9 Barb. S. C. R. 394,) WILLARD, Justice, says: "An unqualified rejection of the claim, unaccompanied with an offer to refer, is equivalent to a refusal to refer." I cannot agree to

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this proposition. A rejection of the claim is no evidence one way or the other on the subject of a reference, or of the willingness of either party to refer. Neither party is bound to refer; and if either desires a reference, he must offer to refer. The executor or administrator cannot be said to refuse until the claimant in some way manifests his willingness to refer. (2 R. S. 90, § 41; *Stephenson agt. Clark*, 12 How. Pr. R. 282.)

Nor was payment unreasonably resisted or neglected. After the defendant had paid \$100 on the claim, he was advised by counsel that the whole demand was illegal; and as he understood the facts of the case, he was justified in making a defence.

There is not sufficient shown on the part of the defendant to justify an order calling upon the referee to make a further report. It was competent for the defendant to have made a case and moved for a new trial, if he thought there was any error committed by the referee.

No costs are allowed to either party.

NOTE.—The foregoing decision affirmed on appeal, Monroe general term, September, 1857, before JOHNSON, T. R. STRONG & SMITH, Justices.

SUPREME COURT.

NELSON and STURGES trustees &c. agt. EATON.

The complaint averred that the defendant made his note to the Atlas Mutual Ins. Co., or order, and that the company indorsed it, and transferred and delivered it to the plaintiffs, but did not expressly aver that the transfer was made pursuant to a resolution of the board of directors.

Held, on demurrer, that if such resolution were necessary, it was implied and provable under the allegation that the company transferred the note: that allegation was not true, if the transfer was not made by the proper officer of the company, and according to law.

Where the complaint showed an agreement between persons called "the undersigned," and the company, that the subscribers agreed with the company, that

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they would lend their notes to the company, if they were secured by collaterals to be left with the plaintiffs, whom they called trustees, and that the trustees should, in their discretion, advance the subscribers' notes to or for the use of the company, on receiving such collaterals as security;

Held, that there was nothing necessarily illegal in such a transaction. It was carried out; the subscribers, through the trustees, so applied their own notes and took as security, the note of the defendant, with others. This gave the plaintiffs a right to recover against the defendant. And even if the transfer to the plaintiffs was invalid as against creditors or stockholders, it was good against the defendant, until those supposed to be enjoined applied to set it aside.

New-York Special Term, January, 1857.

DEMURRER to complaint.

T. H. RODMAN, *for plaintiffs.*

S. P. NASH, *for defendant.*

MITCHELL, Justice. The complaint shows that the defendant made his note to the Atlas Mutual Ins. Co. or order, and that the company indorsed it, and transferred and delivered it to the plaintiffs. This passed the title of the company to the plaintiffs, and entitled them to sue unless they are precluded by some other statement in the complaint. The complaint does not expressly aver that the transfer was made pursuant to a resolution of the board of directors. If such resolution were necessary, it is implied and provable under the allegation that the company transferred the note. That allegation is not true, if the transfer was not made by the proper officer of the company, and according to law. The complaint states that *after* the transfer the company "*became insolvent*," and was dissolved. This is an indirect statement, that it was solvent when the transfer was made. It would be untrue to say that the company *became insolvent after* the assignment, if it were insolvent before, and at the time of the assignment. The complaint shows an agreement between persons called in it "the undersigned" and the company. It is very improperly written; but its fair interpretation is, that the subscribers agreed with the company that they would lend their notes to the company if they were secured by collaterals, to be left with the two plaintiffs, whom they called trustees, and that

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the trustees should, in their discretion, advance the subscribers' notes to or for the use of the company, on receiving such collaterals as security. There is nothing necessarily illegal in such a transaction. It was carried out. The subscribers, through the trustees, so applied their own notes, and took as security the note of the defendant, with others. This gives the plaintiffs a right to recover against the defendant.

Even if the transfer to the plaintiff is invalid as against creditors or stockholders, it is good as against the defendant, the debtor of the company, until those supposed to be injured, apply to set it aside. They may have elected to have the money collected in this suit, and to contest their right to it when collected, or they may have chosen to ratify the assignment. Such transfers are voidable, not void.

The demurrer by the defendant must be overruled with costs.

SUPREME COURT.

GERARD M. L. HARDENBURGH agt. CALVERT CRARY and others.

The defendant moved to set aside the verdict for irregularity, on the ground that one of the *jurors* upon the panel had not been *sworn*.

Held, that such an omission, unaccompanied by injury or prejudice, was not a ground for setting aside the verdict.

The statute declares (2 R. S. 425, § 7, *subd.* 14,) that a verdict shall not be affected by reason of any default or negligence of any clerk or officer of the court, or of the parties, or their counsellors or attorneys, by which neither party shall have been prejudiced.

Although the practice of swearing generally, all the jurors at the commencement of the circuit, for all the cases in which they may be empaneled during the entire circuit, is not in conformity with the requirements of the statute, (which requires each panel of twelve jurors to be sworn as drawn for each cause,) yet it is wholly a matter of form, and no advantage can be taken of the irregularity, unless the objection is taken in season to have it corrected.

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Albany Special Term, July, 1857.

MOTION to set aside verdict for irregularity. The action was tried at the Sullivan circuit, held in June, 1857. The plaintiff recovered a verdict for \$500. One of the jurors who rendered the verdict was *Wilson D. Spaulding*. He was drawn and summoned as one of the regular panel for the circuit. He attended on the first day of the circuit, but did not arrive at the court-house until just after the panel had been called and sworn. He continued to attend as a juror during the circuit, and was called and sat as a juror, without being sworn, in this and five other causes, without objection. The fact that he had not been sworn was unknown to the parties. For this irregularity, the defendants moved to set aside the verdict.

JOHN K. PORTER, *for plaintiff.*

LYMAN TREMAIN, *for defendants.*

HARRIS, Justice. The statute requires that at the opening of a circuit court, the clerk shall deposit in a box, ballots containing the names of all the persons returned as jurors; and when an issue shall be brought on for trial, he shall, under the direction of the court, draw out of the box a sufficient number of ballots to constitute a jury, and the first twelve persons who appear as their names are drawn and called, and shall be approved as indifferent between the parties, *shall be sworn*, and shall be the jury to try such issue. In practice, this mode of proceeding is never followed. Before any cause is called on for trial, the jurors in attendance are sworn generally for all the cases in which they may be empaneled during the entire circuit. It is obvious, that this practice is not in conformity with the requirements of the statute. But as the whole thing is matter of form, no advantage can be taken of the irregularity, unless the objection is taken in season to have it corrected. I suppose that, notwithstanding the general oath administered to the jurors at the opening of the circuit, it would be the right of a party, if he thought it worth

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while, to have the jurors drawn in his particular case sworn, after they had been so drawn. But, if he omit this, he cannot afterwards object to the regularity of the proceedings. (See *People agt. Albany Com. Pleas*, 6 *Wend.* 548.) So, in respect to the absence of the proper qualifications to serve as a juror, the party may, when the jurors are drawn, object that any juror has not the requisite property, or is too old or too young, or is otherwise disqualified to serve. If these objections are improperly disregarded, he will have his remedy. But if he omit to take the objections in season, he cannot afterwards be heard to question the regularity of the proceedings. Even his ignorance will not be allowed as an excuse for not objecting at a time when the ground of objection might have been removed. He must show *injury*, as well as *ignorance*, before the court will interfere. The court, in this country, have uniformly acted upon this principle. In all cases where the objection is technical, and might have been obviated upon the mere mention, at the time the irregularity occurred, and where such irregularity has not been productive of any injury whatever; the application has been refused. Indeed, it is declared by statute, that a verdict shall not be affected by reason of any default or negligence of any clerk or officer of the court, or of the parties, or their counsellors or attorneys, by which neither party shall have been prejudiced. (2 *R. S.* 425, § 7, *sub.* 14.)

This whole subject was very fully examined by Mr. Justice SUTHERLAND, in *The People agt. Ransom*, (7 *Wend.* 417.) The rule which he deduces from a review of the cases relating to the question, is, that "any mere informality or mistake of an officer in drawing a jury, or any irregularity or misconduct in the jurors themselves, will not be a sufficient ground for setting aside a verdict, either in a civil or criminal case, where the court are satisfied that the party complaining has not, or could not have sustained any injury from it."

In *Dovey agt. Hobson*, (6 *Tuunt.* 460,) a motion was made to set aside a verdict on the ground that one man who served as a juror had answered to the name of another. GIBBS, Ch.

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J., said: "It was discretionary with the court to grant or refuse such an application. If justice requires a new trial, they will grant it; if not, they will refuse it." (*See also The King agt. Hunt, 4 Barn. & Ald. 430.*)

In this case, it is not shown, or even pretended, that the defendants have, in any way, been prejudiced or injured by the omission of the clerk to swear the juror. Such an omission, unaccompanied by injury or prejudice, is not a ground for setting aside the verdict. The motion must be denied, but I am not inclined to charge the costs of the motion upon the defendants.

SUPERIOR COURT.

CHARLES S. WILLETT agt. JAMES STRINGER and others.

When upon an *appeal* an *undertaking* has been given fully complying with the statute, and the appeal is perfected, the appellant does not remain responsible for the consequences of misfortune and *insolvency of his sureties*.

But there is a substantial distinction between the case of an *injunction*, and that of an appeal. In case of injunction, if the protection, by the security substituted, should become entirely lost, as by insolvency of all the obligors, the right to the injunction would be restored; and if it is partially diminished, the question remains open, as it was originally, what will afford the party reasonable indemnity.

It is a question of judicial discretion, whether to allow a bond given on a claim of personal property, or for an injunction, to remain, where one surety has become insolvent, and the remaining surety solvent, or direct that fresh security be given.

At Chambers, October 1, 1857.

MOTION that a surety be added to the undertaking given in this cause, or a new undertaking be given to the plaintiff, with additional surety.

L. S. CHATFIELD, *for plaintiff.*

JOHN VAN VLECK, *for defendant.*

Willett agt. Stringer and others.

HOFFMAN, Justice. The plaintiff claimed upon a chattel mortgage for about \$6,000. The defendants Stringer & Townsend are in possession of the mortgaged property, (printing presses, &c.) One other defendant claiming upon a mortgage of a previous date for \$2,000, and another mortgage of a subsequent date is mentioned as in existence for \$6,000, and that steps have been taken upon it, but the mortgagee is not a party to this action. The whole value of the property is \$10,000.

On the 3d of April, 1857, an order was made that the defendants Stringer & Townsend execute to the plaintiff, a bond, with two sureties to be approved by one of the justices of the court, in a certain penalty, conditioned that they would pay to the plaintiff such sum as should be adjudged due upon the mortgage to the plaintiff, out of the said sum of \$10,000, the value of the property, and after deducting all prior liens, which might be established, with interest; that upon the execution and delivery of such undertaking, the injunction order should be discharged; but in default thereof, it should be continued as originally granted.

The said defendants were, however, enjoined from assigning, selling or incumbering, or parting with the property.

The bond was duly executed and approved. It now appears that one of the sureties has become insolvent, which is the ground of the present application.

In the case of *Bettshoven* agt. *Wheaton*, special term, December, 1854, I held, with the concurrence of three justices, that when upon an appeal an undertaking had been given fully complying with the statute, and the appeal was perfected, the appellant did not remain responsible for the consequences of misfortune and insolvency of his sureties. But it was noticed as of considerable weight, that appeals, both under the civil law, and in the court of chancery, were at first matters of absolute right. The restrictions as to security, &c., have been made by statute or rule.

The case of *Bridges* agt. *Camfield*, (2 *Edw. Rep.* 208,) was referred to, in which Vice-Chancellor McCoun held, that

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where security for costs had been given, and a surety became insolvent, the party might be compelled to add a new one.

In the case of *The Hartford Quarry Co. agt. Pendleton*, (4 *Abbott's Rep.* 460,) Justice INGRAHAM decided that even in such a case, a new security would not be required.

It is obvious that there is a substantial distinction between the case of an injunction, and that of an appeal. In the former, the court, as in this instance, finds the party apparently entitled to the remedy, but in its discretion, substitutes the security as sufficiently protecting the party; and because of the great inconveniences resulting from breaking up the business of the other party, when, perhaps, it may result that the injunction ought not to have been allowed. If the protection by the security thus substituted, should become entirely lost, as by insolvency of all the obligors, certainly the right to the injunction would be restored. And if it is partially diminished, the question remains open, as it was originally, what will afford the party reasonable indemnity? If the court think that the bond without the present insolvent surety would have sufficed, it may treat it as now sufficient, the chance remaining of his future solvency. If otherwise, fresh security may be exacted. Other circumstances may influence the determination. It becomes thus a question of judicial discretion in each instance.

It is shown by the opposing affidavits that one of the sureties given by the plaintiff on obtaining the injunction, is insolvent. I should, in no event, grant the present application without extending a similar rule to this bond. Upon all the facts stated, I do not deem it necessary to make any orders.

SUPREME COURT.

JOHN LENT agt. JOHN McQUEEN and others.

Where the plaintiff shows a judgment perfected, and an execution issued thereon, and return unsatisfied in due form of law, it is a matter of course, on his application, to reach the equitable property of the defendant, to appoint a receiver. And a plaintiff should always make such an application when he has obtained an injunction against the judgment debtor, to protect the property and effectuate his lien.

On such an application, the court cannot go behind the judgment and execution, to consider the merits of the judgment, in any respect.

Monroe General Term, December, 1857.

Present, JOHNSON, WELLES and SMITH, Justices.

APPEAL from an order made by Justice GREENE, at the Genesee circuit, directing a reference for the appointment of a receiver.

The action was a creditor's suit upon the return of an execution unsatisfied. The defendant resisted the appointment of the receiver, on the ground that the judgment was confessed to secure a contingent liability by indorsing upon a bill of exchange which had not yet matured, and that therefore, nothing was yet due to the plaintiff.

JAMES WOOD, JR., *for appellant.*

MR. BISSEL, *for plaintiff.*

By the court—E. DARWIN SMITH, Justice. Upon the return of an execution against the property of a defendant, on any judgment at law, or upon a decree in equity, the plaintiff has the right to institute a suit to reach the equitable property of the defendant. This is the creditor's bill of the late court of chancery, and is a proceeding in equity in this court, and is to be governed by the same rules and principles which formerly were applied to such suits when the courts of law and equity were distinct.

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If the plaintiff shows a judgment perfected, and an execution issued thereon, and return unsatisfied in due form of law, it is a matter of course to appoint a receiver in such cases. And a plaintiff should always make such an application when he has obtained an injunction against the judgment debtor, to protect the property and effectuate his lien.

On such an application, the court cannot go behind the judgment and execution. This was so held expressly in *Sandford agt. Sinclair*, (8 Paige, 378;) *S. C.*, (8 Edwards, 393;) *Hine agt. Woolsey*, (289.) Chancellor WALWORTH, in the case of *Sandford agt. Sinclair*, says: "If the plaintiff proceeded irregularly in issuing execution in the supreme court or in procuring its return, the defendant should have applied to that court to set aside the execution or the return for irregularity. All that is proper for this court to do, is to stay the suit here until such application can be made to the court of law."

Whether the plaintiff was entitled to issue the execution in this case, before his liability became fixed by the protest of the bill of exchange for its non-payment by the acceptor, or before it had in fact been paid by the plaintiff, were questions which can only be raised by motion at special term. The application for the appointment of receiver could not be resisted by any objections of this kind. The order at special term was clearly right, and should be affirmed, with \$10 costs.

SUPREME COURT.

JOHN HECKER and others agt. WILLIAM H. DE GROOT and
others.

Where the defendants are sued for damages occasioned by a fraud committed by them, on demurrer to the complaint, which admits they were instrumental in perpetrating the acts constituting the fraud, they cannot escape liability by showing that they acted as *agents*.

Toll, assignee, &c. agt. Thomas.

New-York Special Term, April, 1857.

DEMURRER to complaint.

J. NEILSON, *for plaintiffs.*

S. SANXAY, *for defendants.*

CLERKE, Justice. The defendants are sued for damages occasioned by a fraud committed *by them*. It matters not in what capacity they acted, or with whom they co-operated. They were instrumental in perpetrating the acts constituting the fraud. This is admitted by the demurrer. If indeed a person is the unconscious instrument of others in committing an injury, he is not personally liable for the consequences; but, where he knowingly engages in an unlawful course, whether for his own immediate benefit or not, he cannot escape liability by showing that he acted as an agent.

The amount of damages is never the subject of demurrer. This is to be determined at the trial.

Demurrer overruled, with liberty to answer in twenty days, on payment of costs of term.

SUPREME COURT.

ABRAM W. TOLL, assignee of the The Mohawk Valley Farmers' Ins. Co. agt. JAMES THOMAS.

FIVE OTHER CAUSES—SAME PLAINTIFF agt. DIFFERENT DEFENDANTS.

Where a cause is referred at the circuit by stipulation, the *costs of the circuit* to abide the event of the action, the successful party will be entitled to such costs, if it does not appear that such stipulation was exhibited to the taxing officer; and especially where the objection to their allowance was not raised *specifically* on the adjustment.

Certified copy order of reference, is properly taxable. It is evidence for the referee, and his authority to act in case of objection.

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The referee's fees are properly taxable where they are sworn to have been paid, by the general affidavit of disbursements.

A general indefinite objection to the sufficiency of an affidavit of attendance of witnesses, on the adjustment of costs, is not sufficient. The objection must be specific, and point out particularly wherein the affidavit is insufficient. Consequently, where such a general indefinite objection was made to such an affidavit, which failed to state that the witnesses attended under the advice of counsel as to their materiality; *held*, that the objection was insufficient.

The items for *docketing and transcript* of judgment are taxable when it is shown there is probable necessity for it, such as that some of the defendants reside in different counties.

Where in several actions, the plaintiff has regularly obtained judgment at the circuit or special term, the court have no power, on motion of the defendant, to grant an order to stay proceedings in all the actions but one, until the decision of the general term in that one, or to abide the event thereof.

After a regular *appeal* to the general term, the court, on a proper application, where it is made to appear that a decision in one cause will dispose of all the questions in the others, grant an order to hear an argument in one, and that the others abide the result of that one; or the court may refuse to hear but one argument.

Schenectady Circuit and Special Term, Oct. 1857.

MOTION for re-adjustment of costs.

The bills in all the cases were adjusted together, and consisted principally of several items. The counsel for defendants objected to the allowance of the items for calendar or term fees, in each case, upon the ground that it did not appear that said causes were, either of them, necessarily on the calendar of the term for which they are severally charged, and not reached or postponed. And also to the allowance in each case of the items for certified copy orders, on the ground that they were not a proper or allowable item of disbursements. The counsel further objected to the allowance of referee's fees, as being too large, and not shown to have been incurred; and also to the allowance of transcript and docketing, on the ground that it was not shown to have been necessary; and to the several items of witnesses' fees, upon the ground that the affidavit of attendance was insufficient.

The issues in all the actions but one, were joined on or previous to the 8th of August, 1855, and in that one (against Barnard) July 14, 1857.

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All the causes except the one against Barnard, were noticed for trial by the plaintiff, and placed on the calendar for the Schenectady circuit in November, 1855. The case against Mitchell was noticed for the same circuit by defendant's attorney. The attorney for the plaintiff swears that all and each of the five causes were referred at said circuit by stipulation to Thomas W. Mitchell, Esq., and that in all of them the costs of the circuit were to abide the event of the suit, as appears by stipulation, copies of which are annexed to his affidavit. It does not appear that these stipulations were shown to the clerk, at the time of the adjustment; neither does it appear what the objection was, specifically to the item, nor to the want of proof of *referee's* fees. The attorney swore, in his affidavit presented to the clerk, that the referee's fees, among other items of *disbursements*, had been incurred; and the affidavit of the attendance of witnesses in each case, and of the travel, was full except that it did not state that the attendance was under the advice of counsel, after stating to him the facts expected to be proved by each witness. The counsel for defendants also objected to the allowance of the item of transcript and docketing, on the ground that it was not shown to have been necessary; and also to the items for certified copy orders, on the ground, that they were not a proper and allowable item of disbursements. The clerk adjusted the costs as made out, and defendant appeals and moves to set aside the judgments, for re-adjustment.

A. HOUGH, *for defendants.*

WILLETT & HAWLEY, *for plaintiff.*

C. L. ALLEN, Justice. That part of the motion which moves to set aside the judgments, cannot be granted. If the costs have been improperly adjusted, the court will order a re-adjustment and direct the amount, if less than at the first adjustment, to be deducted from the judgment, or from the execution, if any have been issued, allowing the judgments to stand.

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In the present case, the objection to the allowance for calendar or term fee, does not seem to have been well taken. One of the attorneys for plaintiff, swears that the actions were all referred by consent of parties, and that the costs of that circuit were to abide the event of the action in each case, and copies of the stipulations are annexed to the affidavit. Whether these stipulations were exhibited to the clerk or not, does not appear. It would rather seem not; but the affidavit of the defendant's counsel does not state that this objection was taken specifically. If it had been, the stipulation would probably have been exhibited.

The items for certified copy orders of reference, were properly allowed. They were evidence for the referee, and his authority to act in case of objection. It is both *common and proper* to procure them. The referee's fees were sworn to have been paid in the general affidavit of disbursements. Besides, the receipt of the referee in each case, is now produced, showing the actual payment to and receipt by him of the amount charged.

In relation to the witnesses' fees, the affidavit seems to be full, except that it does not depose that the witnesses each attended in pursuance of the advice of counsel.

It has been decided in many cases, that the affidavit must state the respective names and places of abode of the witnesses, the distance they respectively travelled, and that each of them was or was believed to be, a material and necessary witness, for the party on whose behalf he was subpoenaed. Their materiality need not be shown in the first instance, until the opposite party shall have raised a suspicion that they were subpoenaed or otherwise called for the purpose of swelling the bill. The presumption is good faith till contrary is shown. If the adverse party shows that a number of witnesses were not called on the trial, the party calling for the expense of their attendance, must explain why they were not called, or the expense of their attendance should be disallowed. The clerk then, is not longer at liberty to follow the ordinary affidavit. (5 *Hill*, 595 · 3 *id.* 457; 6 *id.* 376; 19 *Wend.* 82; 6 *How.*

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410.) In this last case, the affidavit stated that the witnesses attended under the advice of counsel, and I believe that such is the usual affidavit. Here, however, the defendants did not specifically object that the affidavit failed to state such fact, or it might have been, and probably would have been supplied. Indeed, no other objection seems to have been taken, than the general indefinite one, that the affidavit was insufficient, without specifying wherein. The last item objected to, is the item for transcript and docketing.

The affidavit of defendant's counsel, shows that the defendants in all the cases but the two first, reside in the county of Schoharie. There was probable necessity, therefore, for transcript and docketing in that county in the last four cases. In the two first, the plaintiff must deduct 25 cents *in each*. The motion must be denied, but as there was some probable cause for making it, it must be without costs.

Order accordingly.

A motion was also made at the same term, in these causes, and in two others in favor of the same plaintiff—one against Silas Brown, and the other against Martin A. Watson—for an order staying proceedings in all the actions but one, until the decision of the general term might be obtained in the first action, or to abide the event of said action.

C. L. ALLEN, Justice. I know of no power that the court possesses to grant this motion. The plaintiff has regularly obtained judgment, in each of the actions, which are against different individuals. It is said that the same questions are involved in each action. One of the attorneys for plaintiff, swears that the pleadings are materially different; that in some of the actions questions of fraud were raised by the answer of defendants, and that in others the answers were simply denial; that objections were taken on the trial on the pleadings to testimony offered in some which were not made in, nor were applicable to the others, and that the testimony on the part of plaintiff in some cases was different from that given in the others. This would seem to dispose of the ap-

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plication. But be this as it may, the court cannot stay the plaintiff in the execution of his several judgments, unless the defendant avails himself of his right to do so, by appeal. After the causes are appealed at general term, the court may, on proper application, where it is made to appear that a decision in one cause will dispose of all the questions in the others, grant an order to hear an argument in one, and that the others abide the result of that one, or they may refuse to hear but one argument, as they sometimes refuse to try but one cause at the circuit where several are on the calendar involving the same points. It is said that the court may order a stipulation or undertaking, requiring the defendants in each case to abide the event of the decision in the first action, as asked for. But if the court have no power to grant an order staying the proceedings, they can require no undertaking which would be binding on the parties; such an undertaking would be utterly void, and in the meantime if defendants should become insolvent, the plaintiff would be entirely remediless, and his loss be thus occasioned by the unauthorized interference of the court.

The motion must be denied with \$10 costs.

Order accordingly.

SUPERIOR COURT.

H. W. WILDE agt. ALFRED and LOUIS JOEL, FLORA JOEL
and WM. LEEDS.

In ascertaining the *damages* on a reference upon the *discharge of an injunction*, the question arises whether any other allowance can be made for *costs or counsel fees*, than what the Code permits to be recovered by a successful party against his adversary?

"There may be allowed to the prevailing party upon the judgment, certain sums by way of indemnity for his expenses in the action, which allowances are in

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this act termed costs." The measure of compensation between attorney and client, is left to the agreement, express or implied, of the parties. (*Code*, § 303.) *Held*, that the import of this provision is, that the unsuccessful party shall only be subjected to the charges specified as costs, where the action takes the ordinary course. But where there is a *special contract* as to damages, (and the injunction bond amounts to this in fact,) it will control; it will afford a new rule of estimate, and is not to be affected by the ordinary rates of allowance.

Another question then arises, whether if *counsel fees* are allowable, they can only be allowed when *actually paid*, as it is the damage sustained which is to be repaid, not any contingent liability?

The Code has left the compensation of attorney and counsel, to the operation of any agreement express or implied. Counsel can have the same remedy for services rendered which they possessed before its passage.

If a client can be made responsible, and a claim is reasonable, a bond of indemnity would appear to cover such a liability, as much as an actual advance. Therefore counsel fees, although *unpaid*, if reasonable, can be recovered in the shape of damages, in an action upon an injunction bond.

And then another important question arises, what is the effect of the Code as to the mode of ascertaining damages by an assessment under an order of reference? What does the report if confirmed, settle? Can it be followed by a judgment for payment of the amount? If it can, as to the principal and party to the action, can it be as to the sureties? or is the only remedy an *action on the undertaking*?

Held, that under the provisions of the Code on this subject, a reference establishes the amount of damages, so that they become finally liquidated as between the parties. Where there are sureties, this shows the propriety of directing notice to be given to them. Legal defences which are wholly independent, will arise, and may be taken in the action on the undertaking. There is not authority enough to warrant a judgment upon the bond for the amount recovered, even against the plaintiff and obligor. It is therefore the safest course to bring an action upon the undertaking.

Although the provision of the Revised Statutes, (2 *R. S.* 190,) which is presumed to be in force, that the chancellor shall direct the delivery of any bond executed under the provisions of the article to the person entitled to the benefit thereof, for prosecution, whenever the condition thereof shall be broken, or the circumstances of the case shall require such delivery, yet the court might well decline the delivery up of an undertaking on file in these cases; (*See Code*, § 423;) as an inspection to draw the complaint is all that is necessary; and upon the trial, the clerk can be subpoenaed to produce it in case of dispute.

The items disallowed and allowed by the court *seriatim*, as damages on dissolving the injunction in this case, will be found stated at the conclusion of the opinion.

General Term, January, 1857.

BY the court—HOFFMAN, Justice. This is an appeal from
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order at special term, confirming a report of the referee, ascertaining damages upon an injunction discharged.

The plaintiff gave his own undertaking, upon obtaining the injunction, conditioned to pay to the defendants enjoined such damages, not exceeding the sum of \$500, as they may sustain by reason of the said injunction, if this court shall finally decide that the said plaintiff was not entitled thereto; such damages to be ascertained by a reference or otherwise, as the court shall direct.

The defendants were enjoined from selling, or in any manner disposing of the stock of jewelry and other property of the defendants Alfred and Louis Joel, in the store No. 143 Broadway, in the city of New-York. Injunctions had been obtained in two other suits against the same parties.

1st. The first point raised is, that no other allowance can be made for costs or counsel fees, than what the Code permits to be recovered by a successful party against his adversary. The 222d section of the Code is almost identical in its language with the rule of the supreme court in equity, adopted in 1847; and that was a transcript of the rule of the court of chancery in force from 1837. Unless there is something in other parts of the Code to furnish a different rule, the decisions of the courts upon provisions so similar, will afford a sufficient guide for determining this question. In the cases of *Edwards* agt. *Bodine*, (4 *Edw. Ch. Rep.* 292, 11 *Paige*, 224,) and in *Aldrich* agt. *Reynolds*, (1 *Barb. Ch. Rep.* 613,) it was settled that counsel fees paid in order to obtain a dissolution of an injunction, could be included in the amount of damages assessed upon a bond, though not taxable under the fee bill then in force. The provision of the Code as to the costs, cannot have a greater effect upon this question than the provision of the old fee bill. By the latter, "for services hereafter done or performed in the several courts of law and equity in this state, by the officers thereof, or in any proceeding authorized by law, the following fees shall be allowed." (2 *R. S.* 622.) By the former, "there may be allowed to the prevailing party, upon the judgment, certain sums by way of indemnity for his

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expenses in the action, which allowances are in this act termed costs." The measure of compensation between attorney and client, is left to the agreement, express or implied, of the parties. (§ 303.)

I take the import of this provision to be, that the unsuccessful party shall only be subjected to the charges specified as costs, where the action takes the ordinary course. But where there is a special contract as to damages, (and in fact the injunction bond amounts to this,) it will control; it will afford a new rule of estimate, and is not to be affected by the ordinary rates of allowance. And so it was decided in *Coates agt. Coates*, (1 *Duer*, 664.) Damages ascertained upon a reference, consisted chiefly of expenses incurred, and counsel fees paid by the defendant, in order to procure a dissolution of the injunction. The court denied a motion to strike them out of the report.

2d. Another point raised by counsel is, that even if counsel fees are allowable at all, they can only be allowed when actually paid. It is the damage sustained which is to be repaid, not any contingent liability.

The Code has left the compensation of attorney and counsel, to the operation of any agreement, express or implied. Counsel can have the same remedy for services rendered, which they possessed before its passage. If a client can be made responsible, and a claim is reasonable, a bond of indemnity would appear to cover such a liability, as much as an actual advance. In an action for injury to the person, the jury may allow for medical attendance, without payment, indeed, when the party injured, is wholly unable to pay.

In *Haddan agt. Mills*, (4 *Carr. & Payne*, 486,) Chief J. TINDAL, in an action for arresting a party, and holding him to bail without reasonable cause, charged the jury that they might give the plaintiff the amount of the extra costs not allowed in taxation, and some moderate compensation for the trouble and anxiety occasioned by the action. In *Garret agt. Hogan*, (19 *Alabama Rep.* 344,) it was expressly ruled, that counsel fees, although unpaid, if reasonable and necessarily incurred, could

be recovered in the shape of damages, in an action upon an injunction bond. The condition was, "to pay all damages and costs occasioned to the defendants by the vexatious issuing out of the writ." This appears to be a reasonable rule, and consistent with the import of the obligation entered into on this undertaking.

3d. Another question is, what is the effect of the Code, as to the mode of ascertaining damages by an assessment under an order of reference? What does the report, if confirmed, settle? Can it be followed by a judgment for payment of the amount? If it can as to the principal and party to the action, can it be as to the sureties; or is the only remedy an action on the undertaking? The course of the law upon the subject of these injunction bonds, will illustrate these questions.

The system of requiring security, was for a long time unknown in England, with the exception, that where the plaintiff at law was out of the kingdom, the plaintiff in equity, after verdict, was compelled to deposit the amount recovered. (2 *Cox Cas.* 330.) It seems, however, that the practice is now prevalent. (*Novello agt. James*, 31 *L. & Eq. Rep.* 280.)

The 42d rule of the court of chancery in our state, adopted in 1806, provided for a similar deposit, in such a case. The Revised Statutes of 1830, directed security to be given in various stages of proceedings at law, which the injunction was to restrain. The 31st rule of 1829, provided, that where no special provision was made by law as to security, the officer allowing an injunction might require of the complainant or his agent, a bond with security, or his own bond only, to the party enjoined, in such sum as might be deemed reasonable, conditioned to pay such party all damages he might sustain by reason of the injunction. The reasons for adopting this rule, will be found stated in *Edwards agt. Bodine*, (4 *Edwards' Reports*, 192.) On the revision of the rules in 1837, this part of the rule was retained, with some modifications. One was, that the security should not be less than \$500; and this clause was added: "Such damages to be ascertained by a reference to a

master or otherwise, as the chancellor or vice-chancellor having jurisdiction of the cause should direct." (*Rule 31.*)

In the rules of the supreme court, adopted in 1847, after the new constitution, the last cited rule was adopted in nearly the same language. There was added a clause, that an injunction should not be allowed on the plaintiff's bond only, unless he justified in an amount equal to the penalty. (*Rule 21.*) Thus, then, from 1837 to the passage of the Code, the rule was in substance as follows: "A bond was taken in a sum not less than \$500, with or without sureties, conditioned to pay to the party enjoined, such damages as he may sustain by reason of the injunction, if the court shall eventually decide that the complainant was not equitably entitled to such injunction; such damages to be ascertained by a reference to a master or otherwise, as the court having jurisdiction of the cause, shall direct."

The 222d section of the Code is, that where no provision is made by statute, as to security upon an injunction, the court or judge shall require a written undertaking on the part of the plaintiff with or without sureties, to the effect that the plaintiff will pay to the party enjoined, such damages, not exceeding an amount to be specified, as he may sustain by reason of the injunction, if the court shall finally decide that the plaintiff was not entitled thereto. The damages may be ascertained by a reference or otherwise, as the court shall direct. There are some cases under the Code, which tend to answer the present inquiries.

In *Griffin agt. Slate*, (5 *Howard*, 205,) the defendants, after an injunction discharged, moved for leave to prosecute the undertaking, having obtained the report of a referee as to the damages. The court held, that the report ought to be confirmed, for upon it the court was to pronounce its judgment as to the damages sustained by reason of the injunction, and to determine whether the injunction bond should be ordered to be prosecuted. In *Higgins agt. Allen*, (6 *Howard* 30,) the court ruled that where a bond was taken in 1846, in a suit in chancery, and did not contain the clause as to a refer-

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once, such a course could be taken. But under the Code it could be, whether the clause was in the undertaking or not. It was also held, that the undertaking could not be in suit without permission granted.

The court in *Gracie agt. Sheldon*, (8 *Barbour's Sup. Ct. Rep.* 282,) made a similar decision upon a bond taken under the 31st rule of the court of chancery. In *Dunkin agt. Lawrence*, (1 *Barb. Sup. Ct. Rep.* 447,) where an injunction was dissolved on the matter of the bill only, the court refused a reference. It could not be had until the cause was eventually decided. The injunction might be reinstated upon the proofs, and the plaintiff shown to have been entitled to it. In *Sherman agt. The New York Central Mills Co.*, (11 *Howard* 269,) and in *Weeks agt. Southwick*, (12 *Howard*, 170,) a similar decision was made under the Code. In the latter case, a referee had made a report for dismissal of the complaint, but judgment was not yet entered, and the motion was held to be premature.

Loomis agt. Brown, (16 *Barbour*, 325,) was the case of an injunction discharged by the dismissal of the complaint upon a trial, and judgment was docketed. At a special term, the court ordered that the damages sustained by the defendant by reason of the injunction, should be ascertained by an action upon the undertaking. Upon a demurrer to the complaint filed in that action, it was held that the dismissal of a complaint on a final hearing, implied of itself a determination that the plaintiff was not equitably entitled to the injunction at the commencement of the suit.

The case of *Bein agt. Heath*, in the supreme court of the United States, (12 *Howard*, *U. S. Rep.* 177,) was this. An injunction was obtained in Louisiana, upon the equity side of the circuit court, and an order was made that a bond be given very similar to the undertaking under the Code. It was held, that the court of the United States, could not proceed according to the practice of Louisiana in such a case. "A court proceeding according to the rules of equity, cannot give a judgment against the obligors in an injunction bond, when it dissolves the injunction. It merely orders the dissolution, leav-

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ing the obligee to proceed at law against the sureties, if he sustains damage from the delay occasioned by the injunction."

In California, the 120th section of the Practice Act of 1850, is in the precise words of the 222d section of our Code. In *Russell agt. Elliott*, (2 *California Rep.* 215,) an injunction was dissolved, and a reference ordered to ascertain damages. "The referee reported \$300 due. The report was confirmed and judgment ordered for the amount and execution. It appears that this clause of the act was repealed after the proceedings, and the judge below set the judgment and execution aside. The court above ordered a mandamus to compel the entry of judgment. The constitutional question was considered, and the court held, that by entering into the undertaking, the parties had waived a trial by jury.

In *Kelly agt. Lockwood*, (1 *Kelly's Rep.* 72, *Georgia*,) it was held, that the judgment of the court fixing the amount of damages, was all that would be looked to in an action on the bond. I apprehend that the provision of the Code in question is legal, and that a reference establishes the amount of damages, so that they become finally liquidated as between the parties. Where there are sureties, this shows the propriety of directing notice to be given to them. I do not entertain a doubt as to this, so far as the mere quantum or nature of the allowance is concerned. Legal defences which are wholly independent will arise and may be taken in the action on the undertaking. I consider that there is not authority enough to warrant a judgment upon the bond for the amount recovered, even against the plaintiff and obligor. At least, it is certainly the safest course to bring an action upon it. In this connection the provision of the Revised Statutes, (2 *R. S.* 190, 195,) should be noticed. It is to be presumed that this remains in force. (*Cook agt. Dickerson*, 2 *Sandford*, 691.) It is enacted that the chancellor shall direct the delivery of any bond executed under the provisions of the article, to the person entitled to the benefit thereof for prosecution, whenever the condition thereof shall be broken or the circumstances of the case shall require

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such delivery. (*See section 423 of the Code.*) I have generally declined to order the delivery up of the undertaking. An inspection to draw the complaint is all that is necessary, and upon the trial, the clerk can be subpoenaed to produce it in case of dispute.

The conclusions upon which the court without any difficulty agree, are these: 1st. The expenses of the reference to ascertain whether the assignment was made with intent to defraud, should not be allowed as damages, nor the fee upon the motion to confirm that report. This excludes the charge of \$100, and of \$10 for attendance fees before Mr. Sedgwick, and fee on confirmation of report.

2d. No compensation for preparing affidavits to show that the assignment was made in good faith, or for arguing that question, should be allowed. But a reasonable fee should be allowed for preparing to argue, and arguing a motion to dissolve the injunction, on the ground that the plaintiff had no cause of action, and no right to an injunction. If the parties cannot agree upon this, application may be made to the judge who heard the motion to dissolve, to adjust it, or a reference had.

3d. The commissions of Leeds, \$72, which we understand to be his commissions upon the sales generally, is inadmissible. The sale took place; the commission would, in any event, have fallen on the fund.

4th. The interest on the \$600, allowed by the referee, \$122, was properly assessed. This, it will be seen, disposes of the items of \$100, the fee of arguing before Judge DUER, and of the \$25, before Judge PAINE. They must be rejected, and what shall be deemed proper as now indicated, be substituted. The \$15 is allowed.

5th. The majority of the judges who heard the case, concur in holding that the \$50 allowed as damages to Messrs. Leeds, is a proper charge against the plaintiff upon this undertaking. And also, the one-third of \$35, the referee's fees on the inquiry at Leeds' instance.

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6th. A majority are also of the opinion, that the one-third of \$100 which it is assumed was for Leeds' fees and charges of counsel in the three suits, ought to be allowed.

SUPREME COURT.

THE FARMERS AND MECHANICS' BANK OF ROCHESTER agt. EDWARD SMITH and others.

Section 152 of the Code confers no authority upon the court to strike out pleas simply as *false*. Nor was there any such practice before the Code. The provision is to strike out *sham* and *irrelevant* answers and defences.

As to *irrelevancy*, this section retains the old practice of the courts of expurgating pleadings of irrelevant and redundant matter as practiced in the court of chancery, upon exceptions for irrelevancy, and in the supreme court upon motion.

Under the old practice a *sham* plea was a special plea setting up new matter, and tendering a fictitious issue. It was one presenting, apparently, a good defence, but which was, in fact, an ingenious and subtle contrivance, false and feigned in its essential particulars. *Falsity* was and is an essential element in a *sham* pleading.

But a false pleading is not a *sham* pleading, unless it also consists of new matter, and tenders an issue upon some new allegations. The general issue under the old practice, was, therefore, never stricken out as a *sham* pleading.

We have no general issue under the Code, but it allows what is in part equivalent—a general or specific denial of the allegations of the complaint. An answer confined to such denials cannot be *sham* under any definition of that term ever received or recognized by the courts or the profession.

The *truth* of pleadings not *sham* or frivolous is to be tried, not upon affidavits, but by another tribunal, whether verified or unverified.

An answer may be frivolous or *sham*, verified or unverified, and may be struck out as *sham*, or overruled as frivolous, under section 247.

And when a motion is made to strike out an answer setting up new matter as *sham*, verified or unverified, and the motion is not opposed, or is not met by affidavit, showing that it was put in in good faith, together with an affidavit of merits, it should be granted.

But where the defendant substantially re-affirms the truth of his answer, and makes an affidavit of merits, the answer should stand. The remedy for false swearing in such cases is with the grand jury, and the trial of the truth or falsity of the pleadings belongs to another forum.

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Monroe Special Term, November, 1857.

MOTION to strike out answer.

The action was upon a promissory note of \$600, against maker and indorser, and contained the usual allegations of the making and indorsing of the note and of demand, non-payment and protest and notice. The answer of the defendant Smith, the maker, denied the making of a note of \$600, such as was described in the complaint, as therein alleged, and denied the delivery of any such note by him to the payee therein named, and denied being indebted to the plaintiff in the sum of \$600, or in any sum whatever on said note, as alleged in the complaint; and for a further answer, denied upon information and belief, all the other allegations in the complaint, and also alleged that if his, the defendant's, signature appeared upon the note mentioned in said complaint, that such note was made and drawn for \$500, and that the amount for which the same was originally drawn had, since the same was made and indorsed, been altered from five to six hundred dollars, without his consent or knowledge. The answer was duly verified. The plaintiff now moves to strike out this answer as *sham* and *false*, on affidavits asserting that the statements of the answer was untrue, and exhibiting the original note. The defendants, in answer to the motion, now re-assert in substance, the allegation of the answer, that the note was originally made for \$500; that the drawer intended at the time of making the note to draw it for \$500; and that he verily believes that it was drawn for the sum of \$500; and that it was delivered to the payees as and for a \$500 note; and explains the transactions between the parties, out of which the note was, and the occasion on which it was given; and states several confirmatory circumstances; and says the answer was put in in good faith, and that he believes the material allegations therein to be true, and makes a full affidavit of merits in due form.

W. F. COGSWELL, *for plaintiff.*

O. ARCHER, *for defendant Smith.*

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E. DARWIN SMITH, Justice. This is a motion to strike out the answer of the defendant Smith, as *sham* and *false*. Whatever power the court possessed and exercised before the Code, on the subject of purging pleadings of sham, frivolous and impertinent matter, it still possesses.

Section 152 of the Code confessedly confers no new power, but is rather declaratory of the power possessed by the court, as then exercised. The right construction of this section therefore defines the authority and practice of the court, as understood and received by the courts, and by the profession at the time of the enactment of the Code.

Section 152 is as follows: "*Sham and irrelevant answers and defences, may be stricken out, on motion and upon such terms as the court may, in their discretion, impose.*"

Two classes of answers are here specified, *sham* and *irrelevant*. So far as relates to irrelevancy, the section retains the old practice of the courts, of expurgating pleadings of redundant and irrelevant matter, as practiced in the court of chancery, upon exceptions for irrelevancy, and in the supreme court upon motion.

Under the old practice, a *sham* plea was a special plea setting up new matter and tendering a fictitious issue. The courts were accustomed to strike out such pleas, as tending to embarrassment, delay and vexation to the parties, and also, for the reason, that it was unfit for the court to be engaged in the trial of unreal issues. The court sought to protect its own dignity and self respect, by expunging all such sham pleadings from the record, and bringing parties to the trial of the actual matters in dispute. A sham plea was one presenting, apparently, a good defence, but which was, in fact, an ingenious and subtle contrivance, false and feigned in its essential particulars. *Falsity* was and is an essential element in a sham pleading; but a false pleading is not a *sham* pleading, unless it also consists of new matter and tenders an issue, upon some new allegations. The general issue was, therefore, never stricken out, as a sham pleading; because it set up no new

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matter, and consisted of a simple denial of the plaintiff's cause of action, as stated in his declaration or complaint.

It is true, we have no general issue under the Code, but it allows what is in part equivalent, a general or specific denial of the allegations of the complaint. An answer confined to such denials cannot be *sham* under any definition of that term ever received or recognized by the courts or the profession. (14 *Barb.* 398; 7 *How.* 59; 10 *id.* 445; *Grant* agt. *Paine*, 12 *id.* 500; 1 *Abbott*, 116.)

The answer in this action is in substance nothing but a denial of the plaintiff's cause of action. The statement that the note has been altered, if the signature thereto is genuine, is nothing more than a qualification of his general denial of its execution by the defendant. It is not new matter within the meaning of the rule relating to sham pleas. Within the above definition or description of a sham pleading, the defendant's answer clearly is not such a pleading, and cannot be stricken out as *sham*. But this motion is also to strike out this answer as *false*. Section 152, confers no authority to strike out pleas simply as *false*—nor was there any such practice before the Code. The provision is to strike out *sham* answers, &c. The *truth* of pleadings not sham or frivolous, is to be tried by another tribunal, and not upon affidavits. Some distinction has been made in the cases between verified and unverified pleadings. I agree with my brother STRONG, in *The Manufacturers' Bank* agt. *Hitchcock*, (14 *How.* 406,) that there is no well founded ground for the distinction. An answer may be frivolous or sham, verified or unverified, and may be struck out as such, in cases of a sham answer, or overruled as frivolous under section 247. If a motion be made to strike out an answer, setting up new matter as *sham*, verified or unverified, and the motion is not opposed, or is not met by affidavits, showing that it was put in in good faith, together with an affidavit of merits, it may properly be, and should be, struck out as *sham*. In the case of *The Broome Co. Bank* agt. *Lewis*, (18 *Wendell*, 565,) the court say: "The defendant in this case appears by his counsel to resist this motion, but he

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produces no general or special affidavit of merits, makes no pretence that his pleas are true, but on the contrary, by his silence, admits that they are false." In this case there were three formal special pleas, and they were rightly struck out for the reason above assigned. They were truly *sham* pleas. But when the defendant substantially re-affirms the truth of his answer, and makes an affidavit of merits, I think the answer should not be struck out. (*Munn* agt. *Barnum*, 1 *Abbott*, 282.)

The remedy for false swearing in such cases is with the grand jury, and the trial of the truth or falsity of the pleading belongs to another forum.

This motion must be denied, but as I think, upon the merits the plaintiff had reasonable ground to make it, in the uncertain state of the practice, and that the defendant is really laboring under some strange mistake or misconception in regard to the making of the note; it should be without costs, and it is so denied without costs to either party.

SUPREME COURT

VERMEULE agt. BECK and wife.

SMITH agt. SAME.

It is not necessary that various causes of action in one complaint should affect all the parties *equally*. It is enough that they affect all, though in unequal degrees. That is the case wherever there are various incumbrances in a foreclosure suit, or persons having diverse interests as the owner of the fee, and dowress or lessees, &c.

In this case it was *held*, on demurrer to the complaint, that considering the statements in the complaint to be true, the plaintiff had one cause of action against the defendants, and that was a right to a lien on the lands, first, for the value of the plaintiff's share of the estate, or \$850; and secondly, for \$1,000 loaned by her to defendant Beck: or if the two liens were to be deemed within § 167 of the Code several causes of action, they both might be considered on contract, or both as injuries to property, or clearly, both as on transactions connected with the *same subject*, viz: the land. The plaintiff relying on fraud as the basis of her relief as to both transactions.

Vermeule agt. Beck and wife—Smith agt. Sama.

New-York Special Term, January, 1858.

THE defendants demur to the complaint.

CLARENCE A. SEWARD, *for defendants.*

GEORGE C. GENET, *for plaintiff.*

MITCHELL, Justice. Assuming the statements in the complaint to be correct, then the following matters are true.

The plaintiff and Mrs. Beck, the defendant, are sister and brother, and with other like relatives inherited an estate worth \$6,000 over and above all incumbrances. Some of the heirs commenced a partition suit, and made this plaintiff and these defendants parties defendant. Mr. Beck represented to this plaintiff that the estate was not sufficient to pay more than the costs and debts, and that the other heirs had conveyed the lands to him without any consideration, whereas they had each paid him \$850, and he knew the share of each was worth this amount. In consequence of this fraud, this plaintiff conveyed her share to Mr. Beck without consideration, and the deed was recorded 12th June, 1852. The plaintiff soon afterwards discovered that the representations were untrue, and demanded a reconveyance of the property, when it was mutually agreed that Mr. Beck should retain the deed and pay the \$850 to the plaintiff. In June, 1852, the plaintiff lent to Mr. Beck \$1,000, and took a mortgage on those premises for that amount. At his request, she afterwards executed a satisfaction piece of the mortgage, she not understanding its effect, and he representing to her that it would not in any way affect her interest on the land. Beck and wife afterwards conveyed the land to a brother of the wife for one dollar, and he conveyed back to the wife on the same day: these conveyances being made to defraud the plaintiff.

If all these statements are true, the plaintiff has one cause of action against the defendants, and that is a right to a lien on the lands, first: for the value of the plaintiff's share of the estate or \$850, and secondly, for the \$1,000 loaned by her to

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Mrs. Beck; or if the two liens are to be deemed within section 167 of the Code, several causes of action, they both may be considered as on contract, or both as injuries to property, or clearly both as on transactions connected with the *same subject*, viz: the land. (*Subd. 1 of sec. 167.*) They are also both on contract; for the mortgage is on contract and so is the agreement to pay \$850 for the land. They are both for injuries to the plaintiff's property, as they both are based also on the fraud by which the deed was obtained in the one case, and the mortgage was cancelled in the other. The remedy for those frauds is, that the deed and the mortgage should be re-established, or that the land should be declared subject to the payment of the value of the plaintiff's share in the land, and of the loan of \$1,000: and, therefore, Beck's wife, who claims an interest in the land, is a necessary party.

The plaintiff may rely on fraud as the basis of her relief, in both cases; then the agreement to pay the \$850 after the first fraud was detected, is but part of that one transaction, and does not merge the cause of action founded on the first fraud, as it is not an executed agreement, until it is performed. Beck cannot set it up as a bar to the first cause of action.

It is not necessary that various causes of action in one complaint should affect all the parties *equally*, it is enough that they affect all, though in unequal degrees. That is the case wherever there are various incumbrances in a foreclosure suit, or persons having diverse interests as the owner of the fee, and dowress, or lessees, &c.

The demurrer should be overruled with costs of the argument. The defendants may, when the order is settled, elect to answer on payment of costs.

SUPREME COURT.

DAVID HOTCHKISS agt. OLIVER C. CROCKER.

JOHN W. HOLDEN agt OLIVER C. CROCKER and DAVID
HOTCHKISS.

Where the summons and complaint are served together, and the *summons* states the name of the *county*, but no place of trial is stated in the complaint, *held*, that the complaint is *defective*; but may be amended.

This defect is not cured by a reference to the summons, as the statement in the summons does not necessarily show that it is put there to indicate where the place of trial is to be. The plaintiff may indicate any county as the place of trial, notwithstanding the name of a county may be mentioned in the summons. Besides, the Code does not require the county to be stated in the summons, as it establishes nothing if inserted. (*The decision in the case of Merrill agt. Grinnell*, 10 *How.* 31, *approved*, and that in *Davison agt. Powell*, 13 *id.* 287, *disapproved*.)

A motion to strike out such defective complaint may be made in a judicial district where the action in fact is triable.

Tioga Special Term, March, 1858.

In this case the summons and complaint were served together.

MR. RICHARDS, *for motion.*

MR. HOTCHKISS, *contra.*

MASON, Justice. These are two motions made by the defendants in each of the entitled causes, to strike out the complaints for the reason that no place of trial is stated in the complaint. The 142d section of the Code, declares that the complaint shall contain the name of the county in which the plaintiff desires the place of trial to be had, and I think that the case of *Merrill agt. Grinnell and others*, (10 *How. Pr. R.* 31,) was rightly decided. That case holds that the complaint is defective when no place of trial is stated in the complaint,

Hotchkiss agt. Crocker, &c.

and that the complaint will be regarded as irregular on a motion to strike out. This defect is not cured by a reference to the summons, as the statement of the name of the county in the summons does not necessarily show that it is put there to indicate where the place of trial is to be. The plaintiff may indicate any county as the place of trial, notwithstanding the name of a county may be mentioned in the summons. (10 *How. R.* 32.)

The plaintiff lives in Cayuga county, and defendants live in Broome county, and the summons states Cayuga county, and this motion is made at the Tioga special term. The plaintiff claims and insists upon the authority of the case of *Davison agt. Powell*, (13 *How. Pr. R.* 287,) that the place of trial is sufficiently indicated by the summons to require the defendant to make his motion in the seventh judicial district, or in some county adjoining Cayuga. I cannot concur in the decision in that case; and besides, the case before us is distinguishable from that. In that case the summons stated that the complaint would be filed in the office of the clerk of the city and county of New-York, at the city hall. The summons in the cases under consideration, does not state where the complaint will be filed, and the only statement of any county, is in the following form and manner: "*Sup. court, county of Cayuga.*" This does not aid the complaint, for the Code does not require the county to be stated in the summons, and it establishes nothing when it is inserted. It cannot aid the complaint. This action is triable either in the county of Cayuga or Broome, and as the plaintiff has not indicated any county in his complaint in which he desires the trial to be had, I see no reason why the motion may not be made in the district where the defendants reside, as well as those where the plaintiff resides. These motions must be granted unless the plaintiff elects to amend his complaint in ten days after service of a copy of this order, and pay \$10 costs of these motions; \$5 in each suit.

SUPERIOR COURT.

HENRY GREEN agt. FERNANDO WOOD.

Section 391 of the *Code*, gives to either party to an action an *option* to have an adverse party examined before, instead of examining him at the trial. It is error to deny, to the party claiming it, the right to have such an examination, on the mere ground that the party sought to be examined, prefers to be examined at the trial, and offers to stipulate to then attend, so that his examination can then be had. The fact that other suits, against the party sought to be examined, are pending, which are brought by other plaintiffs, and depend upon the same general facts, is not such cause as will justify an order exempting a defendant from examination before the trial.

To refuse to compel a defendant to submit to an examination before the trial, merely because he prefers to be examined at the trial, would make it optional with the defendant, whether he would be examined before the trial or not, whereas the *Code* gives the option to the party who wishes to examine his adversary, whether the examination shall be had before or at the trial.

Before BOSWORTH, HOFFMAN, WOODRUFF and PIERREPONT, Justices.

THIS action is brought to recover damages for an assault and battery committed on the plaintiff, on the 16th of June, 1857, by persons alleged to have done the wrong at the instance of and by the direction of the defendant. It was put at issue on questions of fact on the 27th of July.

On an affidavit of these facts, and that the defendant resides in the city of New-York, an order was made that the defendant appear before one of the justices of this court, on the 9th of March, 1858, to be examined as a witness in the action.

The defendant appeared pursuant to such order, before Mr. Justice PIERREPONT, and offered to stipulate to attend at the trial, and be examined as a witness, and showed that there are eleven other actions pending against him, by other parties, for assaults and batteries committed on the same occasion, and moved that the order for his examination before the trial be, therefore, discharged.

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The justice made an order thereupon, on the 12th of March 1858, that the said order for the examination of the defendant, be discharged.

From the order of the 12th of March, 1858, the plaintiff appealed to the general term.

On the argument of such appeal,

MR. D. D. FIELD, *for the plaintiff*, insisted,

First. The plaintiff has the option of examining the defendant before the trial. That option is his and not the court's, and the court cannot take it from him. The qualification in the 391st section of the Code, applies to the time, place and manner of its exercise, and not to the right itself. (*Reed agt. Brown, 5 Abbott, 418.*)

Second. If the court had, however, a dispensing power, and could relieve the defendant from the operation of the 391st section, "*for good cause shown*," yet, in this case, there is no good cause shown, for not examining the defendant. The rule established by the Code is, that the plaintiff has a right to examine the defendant before the trial. This was introduced, because the discovery which would, in most cases, have been obtained by a bill in chancery was abolished, and a more searching and comprehensive substitute was provided. This defendant must completely show that he comes within a just exception.

(1.) The fact that there are eleven other actions pending for other outrages perpetrated on the same occasion, upon eleven other persons, so far from diminishing, really increases the importance of examining the defendant. After he has been once examined, if the court can relieve him from a future examination, they may then do it with far more propriety than they can do it now.

(2.) The defendant's stipulation to attend at the trial, and be examined as a witness, is not "*a good cause shown*." If it be, a defendant can always relieve himself from an examination, by offering the stipulation, and the statute will be so far repealed

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(8.) The purpose of the statute was not to make sure of the defendant's testimony, but to make sure of it *before the trial*. If the former had been the purpose, the examination, conditionally, provided by section 390, would have been sufficient.

(4.) The stipulation does not afford any equivalent to a previous examination. Suppose the defendant does not attend, and is out of the state, what is the plaintiff to do? Is he to postpone his case till the defendant returns? The court cannot render judgment against him, for his non-attendance; and if they could, they could not by any possibility award to the plaintiff such an amount of damages, as he might, perhaps, obtain, with the aid of the defendant's testimony.

MR. G. DEAN, *for the defendant*, insisted,

I. If the construction given by Judge PIERREPONT, to section 391 of the Code is correct, then this appeal will be dismissed, because the order resting in the discretion of the officer who made it is not appealable. (*Code*, § 349; *Seely* agt. *Chittenden*, 10 *Barb.* 303.)

II. The order is not appealable in any aspect of the case, under section 349 of Code.

III. The provision of section 391 as to the order to be made on good cause shown, by the judge, relates to the examination, and not to the length of notice of the time and place of examination.

(1.) The term "otherwise," relates to manner and not to time. The definition of otherwise is, "in another manner."

(2.) If otherwise relates to the notice only, then it may on good cause shown, be dispensed with entirely.

(3.) The whole provision is for the benefit of both parties, and allows every party to the action to show cause why the examination should be had at the trial or before it.

(4.) The Code does not use the word otherwise, in reference to time of notice. (§ 402.)

IV. The sections 390, 391 and 392, were designed to place

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an adverse party in the same situation in respect to the right of the opposite party to examine him as any other witness.

(1) He must be served with a summons to enforce his attendance. (§ 391.)

(2.) He can only be compelled to testify in the same manner as any other witness. (§ 390.)

(a) By a subpoena at the trial.

(b) Conditionally on showing cause for it. (§ 392.)

(c) This is to be done only on applying to a judge and showing cause. (2 *R. S.* 4th ed. 436; *Voorhies' Code* p. 557; 2 *Abb. Pr. R.* 82.)

V. The discretion of the judge who made this order was wisely and properly exercised. Legislation of last session as to permitting parties to testify. No restraint on parties to prevent them from examining their adversaries in all cases under § 391. Can call him also at the trial. No charge against defendant except on information. The informant can be the witness. There being a dozen suits, to permit it would be oppressive.

By the court—BOSWORTH, Justice. Section 390 of the Code, gives to either party to an action, the right to compel the other party to be examined and to testify as a witness, either at the trial or conditionally, or upon commission. This statutory provision existed before the Code was enacted; that was not passed until the 12th of April, 1848, and took effect on the following first of July. (*Laws of 1848*, p. 497, and 565, § 391, and p. 559, § 345.)

The first section of the act of the 12th of December, 1847, gave to either party the same right to examine the other, and in as clear terms as the Code. (*Laws of 1847*, Vol. II, p. 630, chap. 462.) That act creates the right to examine either party at the trial, and provides the means of enforcing its exercise. (§§ 1 and 2.) The right to so examine at the trial is absolute, as much so as the right of either party to examine any third person as a witness. When the Code was enacted, (§ 345 *Laws of 1848*, p. 559,) and now the 391st section of the Code, was

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superadded to the provisions of chapter 462, of the Laws of 1847. That section provides that "the examination, *instead* of being had at the trial, may be had at any time before the trial, at the *option* of the party claiming it." Thus far the language of § 391, imports that either party has his election either to examine his adversary at the trial or before the trial. The right to examine at the trial is absolute, and the right given by § 391, to examine before, instead of examining at the trial, stopping with the portion of the section already quoted, would seem to be equally absolute. The commissioners in their report to the legislature, advising this addition to the then existing law, and alluding to the act of 1847, said: "That act, however, contemplates the examination at the trial only; we think it important to extend it, so as to permit the examination to take place before the trial, at the option of either party." They further observed, that, "one of the great benefits to be expected from the examination of the parties is, the relief it will afford to the rest of the community in exempting them, to a considerable degree, from attendance as witnesses to prove facts which the parties respectively know, and ought never to dispute, and would not dispute if put to their oaths. To effect this object, it should seem necessary to permit the examination beforehand, that the admission of the party may save the necessity of a witness." (3 *Sand. Sup. Ct. R.* 718 and 719.)

This shows clearly an intention to make an examination prior to the trial a matter of right, as the general rule. Section 391 of the Code, further declares, that this examination may be had "before a judge of the court, or a county judge, on a previous notice to the party to be examined, and to any other adverse party, of at least five days, unless for good cause shown, the judge otherwise order." The words, "unless for good cause shown, the judge otherwise order," whether construed to confer power to compel a party to submit to an examination on a notice less than five days, or to give him a longer period to prepare to be examined, or to defer it until the trial, would affect only the question of the *time* of the examination.

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Whenever and wherever he may testify, he is to be examined, and is to testify, "subject to the same rules of examination as any other witness." (*Section 390.*) It has been intimated in an opinion of the late Mr. Justice SANDFORD, that on cause shown, a party might be required to submit to an examination on a notice short of five days. (*Taggard agt. Gardner, 2 Sand. S. C. R. 669.*) He also held, that an examination before the trial was designed to aid parties in preparing for trial, irrespective of the residence of the party to be examined, or the probability of his being able to attend the trial. (*Partin agt. Elliott, id. 668.*)

We think it a just construction of § 391, that either party has an absolute right to examine the other party before the trial, unless some other cause is shown against it, than a willingness of the latter to be examined at the trial, coupled with the highest moral certainty that he will attend at the trial, so that he can then be examined. A different construction would make it optional with the party sought to be examined, whether he would submit to be examined before the trial or not; the Code gives the option to the party claiming a right to examine the other. It is not therefore necessary to decide, in order to dispose of this appeal, that cause might not be shown which would justify the judge in postponing the examination until the trial, and that this section does not confer power in such a case to so order.

In the present case, no cause is shown against submitting to an examination before the trial, except that the defendant prefers to be examined at the trial, and will stipulate to attend so that he can be then examined, and the further facts that eleven other parties have brought similar actions growing out of the same transaction. It is not obvious why any one plaintiff should be denied the right to have an examination before the trial; because other persons have brought actions against the same defendant, which are yet pending, and depend upon the same state of facts. His examination on the trial of one action would not at all affect the necessity of examining him in behalf of the plaintiffs in every one of the eleven other actions.

Green agt. Wood.

A plaintiff may be unable to make out a case except by the testimony of the defendant; an examination of him before the trial may produce the conviction that a recovery is impossible and lead to a discontinuance of the action without a trial. (*Cockle agt. Underwood*, 3 *Duer*, 676, 679.)

Presumptively a defendant cannot be examined more advantageously to himself at the trial than before the trial; when examined before the trial, the examination, like the trial, is in this court, before a judge of the court; it is taken deliberately and is reduced to writing, and the party examined may, as well as at the trial, testify in his own behalf, in respect to any matter pertinent to the issue. (*Id.* 395.) The examination so taken may be read in his own behalf, whether the other party offers to read it or not. The examination before the trial being as the general rule, a matter of right, an order necessary to permit it to be had, affects a substantial right, and is appealable.

The goodness of the cause shown against it, and which may be held sufficient to exempt a party from testifying before the trial, is at least so far examinable on appeal from such an order, that if it be nothing else than the fact of a purpose to attend at the trial, and a willingness to be then examined, it should be held not enough to satisfy the requirements of § 391 of the Code. For unless other and good cause be shown, the Code is imperative that an examination of either party at the option of the other, may be had before the trial.

We think no "good cause," was shown for not submitting to an examination in this action, and that none being shown, it was the right of the plaintiff to be permitted to examine the defendant, and that the order appealed from must be reversed.

SUPREME COURT.

MILES P. LAMPSON, President, &c. agt. ARCHIBALD MCQUEEN
and others.

An answer consisting of mere negative averments, denying the allegations of the complaint, is not *amendable of course* under § 172 of the Code. The right of amendment of course, under that section, only exists where the pleading to be amended, requires, or admits of a response in the shape of an answer, reply, or demurrer.

After service of an answer containing mere negative allegations, an amended answer setting up new matter, can be allowed only by leave of the court, in a supplemental answer under § 177 of the Code.

Monroe Special Term, November, 1857.

MOTION to set aside inquest.

The action was upon three promissory notes against makers and indorsers. The defendant Archibald McQueen appeared and put in a general answer, denying the allegations of the complaint. The cause was noticed for trial at the late Genesee circuit, after service of such answer. Before the circuit, the defendant's attorney served an amended answer, adding to the matter of the former answer, the allegation as a distinct and further defence, that since the commencement of the suit, as the defendant was informed and believed, the promissory note mentioned and set out in the plaintiff's complaint, had been fully paid and satisfied to the said plaintiff.

The plaintiff disregarded this amendment, and gave immediate notice to the defendant's attorney, that he should not receive it or treat it as a valid amendment, for the reason, among others, that it was put in without leave of the court. The plaintiff's attorney afterwards proceeded, and took an inquest in the cause, which the defendant now moves to set aside as irregular.

JAMES WOOD, JUN., *for defendant.*

CHARLES BARTO, *for plaintiff.*

Lampson agt. McQueen and others.

E. DARWIN SMITH, Justice. The answer first served in this action, consisting of mere negative averments, denying the allegations of the complaint, did not require or admit, either of a reply or a demurrer. It was, therefore, not amendable of course under section 172. The right of amendment of course under that section, only exists where the pleading to be amended requires or admits of a response in the shape of an answer, reply or demurrer. The section is, "any pleading may be once amended by the party of course without costs, and without prejudice to the proceedings already had, *at any time before the period for answering it, expires.*"

The amended answer sets up a new defence, and a defence of matters which had occurred after the commencement of the suit, and after the first answer was put in, and after the cause was noticed for trial.

The right to put in such a defence, did not then exist to be exercised as a matter of course. The defendant could only set up the new matter by leave of the court, in a supplemental answer, under section 177. The right of amendment was not, therefore, given, except by special leave of the court. The plaintiff was, therefore, regular in taking his inquest, and the motion to set aside the same must be denied, but without prejudice to the right of the defendant to apply to be let in to defend upon the merits, and to set up the new matter of defence.

Upon the affidavits before me, I think the defendant has no defence, but as he has made an affidavit of merits, and this motion was obviously made upon the assumption that the inquest was irregularly taken, I will not preclude him from a hearing on the merits upon such case as he may make for that purpose.

Motion denied with \$7 costs.

Mead agt. Mali and Jewett.

SUPREME COURT.

THEODORE H. MEAD agt. HIPPOLITE MALI and OTIS P. JEWETT, impleaded with STACY.

CASEAUX agt. SAME, and two other causes.

Where the plaintiff in the first count in his complaint against the defendants, who were president, vice-president and treasurer of the Parker Vein Coal Company, alleged that the company were authorized to issue stock to the amount of \$3,000,000, in shares of \$100 each; that the stock at the time of the acts complained of, was worth par in the market, or nearly so, and in its intrinsic value, and that but for the acts of the defendants it would have continued to be so; that the plaintiff purchased 200 shares of the stock between 27th of October, 1853, and 25th of February, 1854, and still owned the same; that at that time the company's property was worth at least \$3,000,000; that the defendants fraudulently issued 128,000 shares of the stock beyond what the company was authorized to issue, and realized from the sale \$1,300,000, which they converted to their own use; and that by this over-issue the genuine stock was rendered valueless, and became unsaleable in the market; and the plaintiff's shares had been rendered thereby wholly unsaleable and valueless.

Held, that by the decision of the court of appeals, the company was not liable for the stock thus over-issued. This count was not therefore liable to the objection that the *company* should sue for the wrong.

Held, also, that on the allegation that by the acts of the defendants the stock had become *valueless* to the plaintiff; and not averring what the plaintiff paid for the stock, the objection was one not to be taken by *demurrer*, but on a motion to make the complaint more definite. Then it would result that by the fraudulent acts of the defendants they had made the stock of the plaintiff *valueless* to him. This was an injury which was peculiar to the plaintiff, as regarded the stock owned by him. He could not join the other stockholders with him, because they did not own the shares of their stock jointly, but separately.

Where in the second count of the complaint, the plaintiff alleged that at the times of the purchase of the stock, the defendants made false representations respecting the character and value of the stock, and the then position of the company; representing that the affairs of the company were in a good and prosperous condition, and wholly withholding and concealing from the plaintiff the fact that they had theretofore, and were then making the over-issues of stock; that the defendants made such false statements for the purpose of inducing various parties, and particularly the plaintiff, to purchase largely of the stock; that the plaintiff was influenced thereby in making the purchases, and did not know of

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the over-issue, and that by such over-issue the shares of the stock had become valueless to the plaintiff.

Held, that this count was for a false representation, made not (as was common) to the *seller* of goods, but to the *buyer* of property. To sustain it, the same facts must concur as in an action for a false representation of the credit of a buyer. The representation must be false in fact and so known to the defendants—must have been made with the intent to deceive the plaintiff, and must have produced that effect, and have caused loss to the plaintiff; and the pleading must state what the false representation was.

Held, also, that it was not essential that the representation should be addressed directly to the plaintiff. If it were made with the intent of its influencing every one to whom it might be communicated, or who might read or hear of it, the latter class of persons would be in the same position as those to whom it was directly communicated; but they must have come to a knowledge of it before their purchase.

In all such cases, it is essential that the false representation, or the concealment which made the partial statement practically false, should be made with the intent to deceive.

Held, on the assumption that everything stated in this count, although improperly stated, was true, and applying the rules stated to such cases, there could be but little doubt of the defendants' liability. Although good on demurrer, it was so indefinite as to require amendment in the particulars indicated.

The third count alleged the purchases of the stock by the plaintiff, and the over-issue of the stock, both before and after the plaintiff's purchases; that the certificates for the unlawful stock were similar to those for the lawful; and that the plaintiff believing them to be certificates of lawful stock, purchased 200 shares of them, and paid large sums for them, and that he afterwards discovered that they were spurious.

Held, that this loss was clearly individual to the plaintiff. The objection that he did not allege that he bought of the defendants, and that he had his remedy against the seller of the stock, was not well taken, because, at common law a tortfeasor when sued could not plead the non-joinder of his co-tortfeasors. The principle of the rule was, that the wrongdoer was not entitled to the aid of a court to call on others to constitute and bear a part of the penalty for which he also was liable for his wrong-doing. Much less could he say, when sued, that there was another party, who was entirely innocent, but whom he had deceived, and who in consequence had innocently transferred what he supposed to be of value to the plaintiff, and that the plaintiff must therefore have recourse to that person, and not to the wrongdoer himself.

Nor is the objection valid that the defendants if guilty, are liable to the person to whom they sold the property, and that a cause of action for a tort cannot be assigned. Because first, the first purchaser may have passed the stock away for its full value, and so have suffered no loss; he assigns then not the tort, but the stock, to the present plaintiff, and the present plaintiff is the first person who suffers any loss by the fraud: Second, the spurious certificates were

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the acts of the defendants; (in this unlike the defendants in the *New Haven R. R. Co. case*,) by the certificates the defendants (not the company,) represented to every person who received them that they were genuine; and this representation they made as much to the plaintiff as to the original purchaser. Third, these certificates pass by a power of attorney in blank as to the name of the purchaser, the defendants so passing them, authorized the insertion of the name of the plaintiff as the immediate purchaser from them, or from their agent, and made him thus the immediate contracting party with them. This count held good. As the causes of action were all founded in tort, the several counts were properly joined.

New-York Special Term, January, 1857.

DEMURRER to complaint, as not containing cause of action, and for misjoinder.

F. DOMINICK and M. S. BIDWELL, *for plaintiffs.*

J. M. VAN COTT, *for defendants.*

MITCHELL, Justice. There are three counts in the complaint. The first count shows that the Parker Vein Coal Company were authorized to issue stock to the amount of \$3,000,000, in shares of \$100 each; that the stock at the time of the acts complained of, was worth par in the market, or nearly so, and in its intrinsic value, and that but for the acts of the defendants it would have continued to be so. That Mali was president of the company, Jewett vice-president, and Stacy director and treasurer.

That the plaintiff purchased 200 shares of the stock, between the 27th of October, 1853, and 25th of February, 1854, and still owns the same; that at that time the company's property was worth at least \$3,000,000; that the defendants fraudulently issued 128,000 shares of the stock, beyond what the company was authorized to issue, and realized from the sale \$1,300,000, which they converted to their own use; and that by this over-issue the genuine stock was rendered valueless and became unsaleable in the market, and the plaintiff's shares have been rendered thereby wholly unsaleable and valueless. By the decision in the court of appeals, the company is not liable for the stock thus over-issued. This count is not therefore

liable to the objection that the company should sue for the wrong.

The count does not show what the plaintiff paid for the stock, whether par or so small a sum that his damages must be nominal, if they are to be limited to the deterioration in value which arose after he became the purchaser, as is most probably the true rule; but it shows that by the acts of the defendants the stock has become *valueless* to the plaintiff. This objection, therefore, is one not to be taken by demurrer, but on a motion to make the complaint more definite. Then it results that by the fraudulent acts of the defendants, they have made the stock of the plaintiff valueless to him, and have put in their pocket the value in money of which they have deprived him. This is an injury which is peculiar to this plaintiff, as regards the stock owned by him. He could not join the other stockholders with him, because they do not own the shares of their stock jointly but separately. Each owns his own shares separately, and each sustains his separate loss on his own stock. It is said that the depreciation in the stock was caused by the mistaken opinion of the public, that the spurious stock must be assumed by the company. No such fact appears on the pleadings, and if the fraudulent act of one party causes an injury, which could not be complete but for the concurrent ignorance of the public, the wrong still exists and the consequent damage, and as there is but one wrongdoer, he should make amends for the consequences of his own wrongful acts. That count must therefore be deemed good.

The second count states the ownership of the stock as before, and that at the times of the purchase of the stock, the defendants made false representations respecting the character and value of the stock, and the then position of the company; representing that the affairs of the company were in a good and prosperous condition, and wholly withholding and concealing from the plaintiff, the fact that they had theretofore and were then making the over-issues of stock; that the defendants made such false statements for the purpose of inducing various parties, and particularly the plaintiff, to pur-

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chase largely of the stock; that the plaintiff was influenced thereby in making the purchases, and did not know of the over-issue; and that by such over-issue the shares of the stock have become valueless to the plaintiff.

This is a count for a false representation made, not (as is common) to the *seller* of goods, but to the *buyer* of property. To sustain it, the same facts must concur as in an action for a false representation of the credit of a buyer. The representation must be false in fact, and so known to the defendants—must have been made with the intent to deceive the plaintiff, and must have produced that effect, and have caused loss to the plaintiff; and the pleading must state what the false representation was. It is not essential that the representation should be addressed directly to the plaintiff. If it were made with the intent of its influencing every one to whom it might be communicated, or who might read or hear of it, the latter class of persons would be in the same position as those to whom it was directly communicated, but they must have come to a knowledge of it before their purchase. If the defendant alleged as true of his own knowledge, what he may possibly have supposed to be true, but which was untrue in fact, and did this with the intent to deceive, it is deemed the same as if he knew it to be untrue. He is under no obligation to communicate anything to one not purchasing directly from him, but if he begins to communicate and makes a statement, which is true as far as it goes, but which misleads, because he conceals a fact which he knows, and which if communicated, would have prevented a purchase, and he does this with a view to deceive the purchaser, he is under the same responsibility as if he had made a wilfully false statement as to the matter thus concealed. The rule is saved from too great laxity in all these cases, by one indispensable part of it, namely, that in all cases it is essential that the false representation, or the concealment which made the partial statement practically false, should be made with the intent to deceive. (*See Addington agt. Allen, in court of errors.*) By these rules this count is to be tested. It states that the defendants made false representations respect-

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ing the value, &c., of the stock. If it had stopped here, it would have been demurrable as not showing what the representations were; and on the trial of this case nothing can be proved under that part of the count alone; but it proceeds and states what the representations were, and limits the generality of the previous clause by a special statement, "representing that the affairs of the company were in a good and prosperous condition, and concealing from the plaintiff the fact" of the over-issues. It is not alleged to whom this representation of the condition of the company was made, nor directly that it came to the knowledge of the plaintiff, but indirectly it may be inferred that it did come to his knowledge, for the count states that the plaintiff was *influenced* thereby in making the purchases; he could not have been influenced by the representations, if they had not been in some way reported to him. On demurrer this may be deemed sufficient. (*See opinion of DENIO, J., in court of appeals, in Zabriskie agt. Smith, 3 Kernan, 330.*)

According to this count with this inference in its favor, the defendants made a representation, (it is enough if it was in a newspaper intended to be read by dealers in stock, and to influence them to purchase, and that it was so read by the plaintiff and did so influence him,) that the company was in a prosperous condition, and yet concealed the fact that they had made large over-issues of stock, which they must have known would impair its value; and they must also have known that the purchaser would have regarded the actual statement as false if the fact concealed had been known by him.

Taking into consideration the rules already stated, and that the case is the same as if the defendants had gone to the plaintiff and asked him to buy the stock, telling him that the company was in a prosperous condition, thus professing to enlighten him as to its true condition, and yet withholding from him the knowledge of their wrongful acts, which they knew would reduce the value of the stock, and that this was done with the intention to deceive, and there can be but little

doubt of the defendants' liability. This is on the assumption that everything stated in the count, although improperly stated, is true; on a trial, it may turn out, that one or more of the defendants, had no knowledge of the facts that there was an over-issue, or that the company was not entirely prosperous, and that he or they had no intent to deceive.

This count appears to be good on demurrer; but it is so indefinite, that it should be amended. It should clearly show whether it depends on any false representation, except that resulting from the concealment; also, in what manner that representation was made—as whether orally, or in writing—and how it came to his knowledge, and distinctly allege that the representation came to the plaintiff's knowledge before his purchase, in whole or in part, and when it was made, and what amount of stock he bought after that time. It should be borne in memory, that this count places concealment and falsehood, in these cases, on the same level; it should, therefore, especially avoid the holding back of any fact, or any distinct and full statement connected with the cause of action, which, if fairly disclosed, would show that no cause of action really existed.

The third count alleges the purchases of stock by the plaintiff, and the over-issue of the stock, both before and after the plaintiff's purchases; that the certificate for the unlawful stock, was similar to those for the lawful, and that the plaintiff believing them to be certificates of lawful stock, purchased two hundred shares of them and paid large sums for them, and that he afterwards discovered that they were spurious.

This loss is clearly individual to the plaintiff. It is said that he does not allege that he bought of the defendants, and that he has his remedy against the seller of the stock. At common law a tortfeasor, when sued, could not plead the non-joinder of his co-tortfeasors. It was said that the tort was joint and several, but the principle of the rule lay deeper; it was that the wrongdoer is not entitled to the aid of a court, to call on others to contribute and bear a part of the penalty,

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for which he also was liable for his wrong-doing. Much less can he say, when sued, that there is another party, who is entirely innocent, but whom he has deceived, and who, in consequence of his deception, has innocently transferred what he supposed to be of value, to the plaintiff, and that the plaintiff must, therefore, have recourse to that person and not to the wrongdoer himself.

It is also said that the defendants if guilty, are liable to the person to whom they sold the property, and that a cause of action for a tort cannot be assigned. To this there are several answers. The first purchaser may have passed the stock away for its full value, and so have suffered no loss; he assigns, then, not the tort, but the stock, to the present plaintiff, and the present plaintiff is the first person who suffers any loss by the fraud. The spurious certificates were the acts of the defendants, (in this unlike the *defendants* in the *New-Haven Railroad Company* case;) by the certificates the *defendants* (not the company) represented to every person who received them, that they were genuine; and this representation they made as much to the plaintiff, as to the original purchaser.

Again; these certificates pass by a power of attorney in blank as to the name of the purchaser; the defendants so passing them, authorized the insertion of the name of the plaintiff as the immediate purchaser from them or from their agent, and made him thus the immediate contracting party with them. This count, therefore, is also good.

The action is well brought against three. They could all join in every act alleged against them; the representations made by them may have been in writing and in print and signed by each; the certificates of stock may have been signed by all or by two, and issued by the third in common with the others. As the causes of action are all founded in tort, the several counts are properly joined.

The demurrers must be overruled, with leave to the defendants to answer without payment of costs, unless the plaintiffs elect to amend, and make their complaint more definite in the matters above stated, but with like leave, on payment of costs

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of the demurrer, on his making such amendment. The issue to be as of the time of serving the demurrer.[1]

[1] This decision was affirmed on appeal at the New-York general term, in December, 1857. MITCHELL, DAVIES and PEABODY, *Justices*. PEABODY, J., dissenting.

COURT OF APPEALS.

WILLIAM T. SEYMOUR, Receiver, &c. agt. BENJAMIN WILSON and JOSEPH C. GRIMWOOD.

An assignor who is called as a witness to prove facts tending to show his act fraudulent as against creditors, on the *cross-examination*, may be asked, whether in making that assignment he had any *intent* to defraud his creditors. A receiver appointed in proceedings supplementary to execution, may contest the validity of any transfers of the judgment debtor, with the same effect as if the suit was brought in the name of the creditor. (*Overrules this same case*, 16 *Barb.*, 294. *This last question was decided in the same way in the court of appeals in Porter agt. Clark*, 12 *How.* 107.)

December Term, 1856.

THIS action was referred to the Hon. George G. Scott, as sole referee, to hear and determine the same.

The facts are taken from the report of the case in 16 *Barb.* 294, and are as follows: "Conrad Cramer, on the 15th of March, 1850, recovered a judgment in this court against Ansel C. Durkee, for \$67.12, damages and costs, upon a debt contracted the 1st of April, 1849. The summons was served on the 22d day of February, 1850, in the afternoon. An execution was issued upon this judgment to the sheriff of Washington county, where Durkee resided, and was returned wholly unsatisfied. Cramer thereupon instituted proceedings against Durkee under title nine, chapter two of the Code, and the plaintiff was appointed receiver of his effects. In the forenoon of the 22d of February, 1850, Durkee assigned to the defendants the three first instalments of \$200 each, and the interest thereon to grow due on a mortgage bearing date October 15th, 1849, made by his brother Calvin Durkee and

his wife to him, upon a lot of thirteen acres in the town of Fort Edward, and given to secure the payment of \$1,000 and interest. There was then a prior outstanding mortgage of \$400, upon the undivided half of the premises, executed by Calvin Durkee. The whole premises, according to the testimony, were worth not less than \$800 and not to exceed \$1,000. Calvin was insolvent at the time of this transfer, and had been so ever since; and after assigning the instalments upon his mortgage, owned no other property, and was considerably in debt. Calvin, at this time, owed the defendants \$300, and Sheldons & Wood upwards of \$300. The defendants agreed to appropriate the avails of the mortgage equally to the payment of their debt, and the debt of Sheldons & Wood. The defendants had previously caused to be sold on a judgment given to secure their debt, the aforesaid lot of land. They purchased it on the 7th of February, 1850, and obtained the sheriff's certificate of sale. This certificate was assigned by them to Ansel, when he assigned to them the instalments upon his mortgage. There was no other consideration for that assignment moving between Ansel and the defendants. There was no consideration but brotherly affection moving between Ansel and Calvin for the assignment of the mortgage. And there was no consideration whatever moving as between Ansel and Sheldons & Wood. Before this suit was commenced, the plaintiff applied to the defendants to be allowed the amount of his debt out of the mortgage. They refused to allow it. In his complaint, the plaintiff asked that the assignment of the instalments on the mortgage be declared void as against him, and that the mortgage and bond be assigned to him, or that the defendants be directed to pay the amount of the judgment, and the costs of the supplementary proceedings, with the costs of this suit. The answer denied all knowledge of the judgment, the supplementary proceedings, and of the appointment of the plaintiff as receiver; but admitted the assignment of the bond and mortgage, with the allegation that it was executed to the defendants for a valuable consideration, and by them received

in good faith, and without any intent on their part, or as they believed, on the part of Durkee, to defraud his creditors, and without any knowledge on their part that he had any creditors, and denying certain averments of the complaint, as to the value of the mortgaged premises, &c. The reply denied the averments of the answer."

Judges WILLARD and ALLEN were for affirming that judgment. Judge CADY concurred with WILLARD and ALLEN, Justices, upon the merits, that the assignment was fraudulent and void as against the creditors of Ansel C. Durkee, but he concurred with Justice HAND, that the *receiver* could not question the assignment. The judges being equally divided upon that point, the case could not be decided in the fourth district until Judge WILLARD went into the court of appeals.

Thereupon the first judgment was reversed, and a new trial ordered before the same referee. (*See 16 Barb. 294.*)

Before the second trial, the court of appeals unanimously decided, *in the case of Porter agt. Clark*, (12 *How.* 107,) that a receiver could contest such assignments.

Upon the second trial before the referee, the plaintiff called Ansel C. Durkee, the judgment debtor, and proved by him certain facts tending to show the said assignment fraudulent.

Upon the *cross-examination* the defendants' counsel put the following question: "In making that assignment to Wilson & Grimwood, did you *intend* to defraud Conrad Cramer or any other creditor of yours?" To this question, the plaintiff's counsel objected, on the ground that the witness had no right to swear to his intentions; that he must state only facts, leaving the referee to pass upon the question of intention. The referee sustained the objection, the question was excluded, and the counsel for the defendants excepted to the decision.

The referee again reported in favor of the plaintiff, but found, as a fact, "that there was no actual knowledge by the defendants of Ansel C. Durkee's fraudulent intent," and from that judgment the defendants appealed to the general term.

At the general term Justices JAMES, ALLEN and CADY affirmed the judgment, and Justice HAND dissented.

Taylor agt. Crane and others.

The defendants appealed to the court of appeals, where the case was argued in September, 1856, by

N. HILL, JR., *for appellants.*

E. F. BULLARD, *for the respondent.*

1856, December 25, judgment reversed, and a new trial granted, on the ground that the referee erred in excluding the question to the witness Ansel C. Durkee. All the judges concurred in this except MITCHELL and COMSTOCK, who thought the ruling of the referee upon that point was right.

MITCHELL, J., however, was for reversal upon the merits, and wrote an opinion to that effect.

Upon the merits no five judges agreed. The cause was thereupon referred to the Hon. Reuben H. Walworth as sole referee for a third trial.

NOTE.—General Bullard, attorney and counsel for one of the parties in this case, having had a long and somewhat interesting fight in it, (which is not yet terminated,) furnished the materials for the foregoing report, accompanied by a certificate of Francis Kernan, Esq., late reporter of the court of appeals, stating the grounds upon which the case was last decided in that court—no written opinions given. Upon this authority (which is considered entirely good) the case is published.—REPORTER.

SUPREME COURT.

JAMES B. TAYLOR agt. JONATHAN CRANE and others.

The action of *ejectment* under the Revised Statutes, is to all intents and purposes a *possessory* action. The plaintiff when successful recovers the possession. If the plaintiff has the possession, there can be no need to invoke the aid of the courts to award to him that which he has already.

It is true the *verdict* is to specify the *estate* which shall have been established on the trial by the plaintiff, and unless set aside and vacated pursuant to the statute, it ultimately determines the right and the title, which a verdict in ejectment did not determine before the Revised Statutes; but it does this through the action of ejectment, which up to that time was purely and strictly a *possessory* action.

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The parties *defendants* in an action of ejectment, are: 1st. The occupant, when the premises are actually occupied. 2d. When the premises are not actually occupied, then the person exercising acts of ownership; or 3d. A person claiming title thereto or some interest therein at the commencement of the suit.

Whatever may be the condition of the defendants, whether in the actual occupation, or out of the occupation, and exercising acts of ownership, or simply and purely claiming the title, the plaintiff's condition in respect to his ability to maintain the action remains as it was. He at least must be out of the possession. The possession must be unlawfully withheld from him, and that fact must affirmatively appear upon the *face of the complaint*.

The complaint in this case held defective on the ground that the plaintiff alleged *seizin and possession*, and claimed possession, &c., but did not allege that he lost and was deprived of the possession of the premises, to which the defendants claimed title, which the defendants still unlawfully withheld from him.

Brooklyn Special Term, February, 1858.

DEMURRER to complaint in an action of ejectment.

A. J. PROVOST and J. M. VAN COTT, *for defendants*.

E. W. STOUGHTON, *for plaintiff*.

BROWN, Justice. Notwithstanding the provisions contained in sections 36 and 38 of the Revised Statutes, concerning the action of ejectment, declaring that the judgment under certain limitations shall be conclusive upon the title, it is still to all intents and purposes a possessory action. The plaintiff when successful recovers the possession. "The action of ejectment is retained, and may be brought in the cases and in the manner heretofore accustomed," subject to the provisions of the act. (*Section 1.*) "No person can recover in ejectment, unless he has at the time of commencing the action a valid subsisting interest in the premises claimed, and a right to recover the same, or to recover the possession thereof," &c. (*Section 3.*) He must "aver in his declaration, that on some day therein specified, which must be after his title accrued, he was possessed of the premises in question, describing them as herein-after provided, and being so possessed thereof, that the defendant afterwards on some day to be stated, entered into such premises, and that he unlawfully withholds from the plaintiff

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the possession thereof," &c. (Section 7.) "The defendant may demur to the declaration as in personal actions, or he shall plead the general issue only, which shall be that the defendant is not guilty of unlawfully withholding the premises claimed by the plaintiff as alleged in the declaration." (Section 22.) "It shall be sufficient for the plaintiff to show a right to the possession of such premises at the time of the commencement of the suit, as heir, devisee, purchaser, or otherwise." (Section 25.) Section 30th provides what the verdict shall be when all the plaintiffs show a right to recover possession of the premises, when one or more have such right, and when one or more have no such right, and when it is for undivided shares, &c. Section 33 directs the form of the judgment when the plaintiff prevails, which "shall be that the plaintiff recover the possession of the premises," &c. And section 34 gives the form of the writ in execution of the judgment, which is that the sheriff "deliver to the plaintiff possession of the said premises so recovered, with the appurtenances." All these provisions have reference to the recovery of the possession, and imply that the plaintiff is out of the possession and is seeking to recover it. If he, however, has the possession, there can be no need to invoke the aid of the courts to award to him that which he has already.

It is true the verdict is to specify the estate which shall have been established on the trial by the plaintiff, and unless set aside and vacated pursuant to section 37, it ultimately determines the right and the title which a verdict in ejectment did not determine before the Revised Statutes, but it does this through the action of ejectment, which up to that time was purely and strictly a possessory action.

If the premises are actually occupied, the occupant must be made a defendant. (Section 4.) This was the old rule, and the case of *Doe agt. Stanton*, (2 *Barn. & Ald.* 371,) turned upon the point whether the defendant was in the situation of servant to another, or in the possession as tenant. The latter clause of section 4, is an innovation upon the old practice. It enables a plaintiff to maintain an action for the recovery of lands,

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which are not actually occupied, but it leaves him in other respects in the same condition as if this clause had been omitted. "If the premises are not so occupied, the action must be brought against some person exercising acts of ownership on the premises claimed, or claiming title thereto or some interest therein at the commencement of the suit."

The defendants then are, 1st. The occupant when the premises are actually occupied. 2d. Where the premises are not actually occupied, then the person exercising acts of ownership. Or, 3d. A person claiming title thereto or some interest therein at the commencement of the suit. (*Vide Shaffer agt. McGraw*, 12 *Wendell*, 558; *Banyer agt. Empie*, 5 *Hill*, 48.) It is no longer necessary to prove an actual ouster except when the action is brought by one tenant in common against a co-tenant, in which case an ouster must be proved, or some act amounting to a total denial of the plaintiff's right. If the action be against several defendants and a joint possession of all be proved, the plaintiff shall have a verdict against all, whether they have pleaded separately or jointly. (*Section 28.*)

These references prove, I think, that whatever may be the condition of the defendants, whether in the actual occupation, or out of the occupation, and exercising acts of ownership, or simply and purely claiming the title, the plaintiff's condition in respect to his ability to maintain the action, remains as it was. He at least must be out of the possession. The possession must be unlawfully withheld from him. And that fact must affirmatively appear upon the face of his complaint.

A person in the possession of real property suffers no actual injury from a claim of title by another person out of possession. And if the former desires to have the claim determined, he may effect his object by proceedings under the statute, "to compel the determination of claims to real property in certain cases." If the party claiming should enter upon his possession and exercise acts of ownership, his remedy is by an action of trespass. A party out of the possession cannot maintain trespass, and this is the reason why a party in that condition with a good title, must first resort to his action of ejectment, and ob-

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tain the possession, before he can recover for an injury done to the estate. It would be absurd to adjudge that a plaintiff should recover the possession of that of which he was possessed already, which anomaly must result from permitting a plaintiff to maintain his action when there has been no other disturbance of his possession, but the exercise of acts of ownership or a claim of title. Acts of ownership and a claim of title are some evidence of possession. Indeed, when the premises are unoccupied, they are often the only available evidence of the possession. They are, however, only evidence of the fact, and not the fact itself; because there may be occasional entries and the exercise of occasional acts of ownership and claim of title, while possession remains in another person.

The defect in the complaint in this action—if there be one—consists in this, that the plaintiff shows himself in the possession of the premises claimed. He first states, “that on the 1st day of September, 1855, he was seized in fee simple and possessed of all,” &c., describing the premises by metes and bounds. And “after he became seized and possessed, the said defendants claimed and now claim title to, or some interest in the northern portion of the said premises, lying north, &c., and have exercised and do exercise acts of ownership over the same, or some part thereof, in violation of the right and title of the plaintiff,” and concludes with the usual prayer that he may recover the possession, &c. He does not say, as I think he should have said, that thereby he lost and was deprived of the possession of that portion of the premises upon which the acts of ownership were exercised, and to which the defendants claim title, which the defendants still unlawfully withhold from him. For this reason, I think the complaint materially defective. The latter clause of section 4 of the statute was intended to give a plaintiff having the title and a right of entry, and who was out of the possession, authority to maintain an action and recover lands in ejectment where there was no actual occupation, against a person exercising acts of ownership, or claiming title to land. And this,

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I think, is its sole purpose and office. (*Vide Warner agt. Neligar*, 12 *Howard P. R.* 402, and *Ensign agt. Sherman*, 13 *id.* 35, where this question is incidentally referred to.)

The defendants must have judgment upon the demurrer. With leave to the plaintiff to amend within twenty days, upon the usual terms.

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Where an attorney resides in one town or city and has his office for the transaction of business in another, how shall persons in the latter place serve papers upon him *if his office be closed*? They are not bound to follow him to his residence and make manual delivery there. If bound to serve papers at his residence at all, in such case, service by mail is sufficient.

In such case, if, in compliance with the 5th of the rules of court, the attorney adds the *place* of his office to his name, he is concluded thereby. Such *place* will be deemed his residence for the purpose of such service, so that persons desiring to make service will not be bound to go or send to another town, his actual residence.

And where the paper to be served is an *answer* in a cause in which the summons (in obedience to § 128 of the Code) specifies the place where the answer was required to be served on the plaintiff's attorney, the defendant is not bound to serve his answer in any other place. And if the attorney's office is closed and he does not reside in that place, an endeavor to serve at the office, within the time allowed to answer, followed by an actual service within a reasonable time afterwards when the office is open, will be regarded as a sufficient service.

A party is not bound to make an impracticable service.

Where a plaintiff's attorney issued a summons requiring the answer to be served on him at the city of New-York, and added to his subscription, "195 Broadway," that being his office; and on the *last day* for answering, the defendant's attorney, at about 4 o'clock P. M., sent the answer to his office, and found it closed, the plaintiff's attorney having left the city for his residence at Flushing; and again, the next day the defendant's attorney sent the answer to his office, and the plaintiff's attorney refused to receive it, having in fact entered up judgment and issued execution that morning. *Held*, that the defendant's attorney was regular, the judgment &c., irregular, and the judgment and execution were set aside, with costs.

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*General Term.**Before BOSWORTH, HOFFMAN, WOODRUFF and PIERREPONT, Justices.**Argued March 13th, 1858. Decided March 20th, 1858.*

THE summons in this action in terms, required the defendants to serve their answer upon the plaintiffs' attorney at the city of New-York, within twenty days, and was subscribed by the plaintiffs' attorney, with the addition to his name, of the words and figures, "195 Broadway." The residence of the plaintiffs' attorney is at Flushing, in Queens county, but his office is at No. 195 Broadway, in the city of New-York.

The time to answer expired on the 27th day of January last; and at about 4 o'clock in the afternoon of that day a copy of the answer of the defendants and an affidavit of merits were taken to the office of the plaintiffs' attorney for the purpose of being served. The person employed to make the service, found the office closed, and no person there upon whom to make the service, and could not obtain access to the office so as to leave the papers in a conspicuous place therein. In fact, the plaintiffs' attorney had before 4 o'clock left the city for his residence at Flushing, and the person left by him in charge, had closed the office and gone home before the person arrived with the papers.

On the next day, the defendants' answer and the affidavit of merits were again taken to the office of the plaintiffs' attorney and offered to him, but he refused to receive them. He had already at 9½ o'clock that morning, entered up judgment against the defendants, as upon failure to answer.

The defendants' attorney thereupon moved to set aside the judgment for irregularity, and also for leave to serve the answer, &c., and for other relief, &c., upon the merits. The motion was opposed not only upon the ground that the judgment was regular, but also on the ground that the action was upon two promissory notes, as to one of which the only defence set up in the answer was usury; and that affidavits submitted by the plaintiffs, tended to show that the whole defence was interposed in bad faith, and for the purposes of delay, and that the

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defendants are insolvent and have threatened to dispose of their property so as to give preference to other creditors and defraud the plaintiffs. And the plaintiffs therefore insisted that the defendants ought not to be relieved upon the merits, nor upon any terms. Upon the hearing of the motion at special term, the defendants were permitted to answer upon striking out the defence of usury; so as to defend as to one note only, but upon these terms, to wit: that the sheriff proceed to collect upon the execution the amount of the note thus remaining undefended; that the judgment, execution and levy, stand as security for the amount of the other note; and that the sheriff retain, under his levy, an amount of property amply sufficient to pay such last-named note with interest and costs, including costs of the further litigation.

The motion so far as it proceeded upon the ground that the plaintiffs' proceeding was irregular, was denied; the defendants were required to accept short notice of trial, and the costs of motion, \$10, were directed to abide the result of the further litigation, but if these terms were not accepted, the motion was wholly denied with ten dollars costs. From this order the defendants appealed.

JOHN FITCH & WM. C. NOYES, *for the defendants, appellants.*
E. F. TREADWELL, *for the plaintiffs, respondents.*

By the court—WOODRUFF, Justice. In *Jacobs agt. Marshall*, decided at the general term, December 26th, 1857, it was decided by us that where the plaintiff was strictly regular, in entering up his judgment on failure to answer, and the default was subsequently opened upon terms, those terms rested in the discretion of the court in such sense that whatever we may think of the propriety of discriminating between the defence of usury and any other, we are not at liberty to review the exercise of that discretion. (2 *Code Rep.* 41; 3 *id.* 141; 1 *Comstock*, 43, and cases cited; 4 *Sandford Sup. Ct. Rep.* 709.)

This renders it unnecessary to discuss many of the topics urged upon our attention on the argument of the appeal. Were

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the plaintiffs regular in entering judgment as upon a failure to answer? Section 417 of the Code, requires that where a party shall have an attorney in the action, the service of papers *shall* be made upon *him*, and not upon the party himself. Section 409 provides in respect to service on an attorney, that if he be absent from his office, and there is no clerk therein, and no person there having charge thereof, service may be made by leaving the paper between the hours of six in the morning and nine in the evening in a conspicuous place in the office, or if it be not open so as to admit of such service, then by leaving the paper at the attorney's *residence*, with some person of suitable age and discretion.

And section 410 provides that service by mail may be made where the person making the service and the person on whom it is to be made, reside in different places, between which there is a regular communication by mail. The 5th of the rules of court, provides that on process or papers to be served, the attorney besides subscribing or indorsing his name, shall add thereto his place of residence, and if he shall neglect so to do, papers may be served on him through the mail, by directing them according to the best information which can conveniently be obtained concerning his residence.

Under these several provisions, it may often be material to inquire how service shall be made upon attorneys who reside in one place, and have an office for the transaction of business in another? It is at least doubtful whether such a case is contemplated by these provisions, and in terms provided for.

Section 409, providing for a service at the residence of the attorney, by leaving with some person of suitable age and discretion, contemplates a service at a residence within the same town; so far at least as it can be held to *require* an actual delivery at such residence. Though a service at the actual residence might be sufficient, the party serving the paper cannot be compelled to go out of town to seek it. We are, therefore, clearly of opinion that the defendants were not *bound* to go or send to Flushing, to make manual delivery of the answer in this case, at the residence of the plaintiffs' attorney.

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Any other view of this section would be palpably unreasonable, for if *bound* to go to Flushing to make service, the same rule would require a party to go to any part of the state, however remote. Were the defendants *bound* to serve the answer by mail? It was not insisted upon the argument of the appeal that they were so bound, or that such a service would in this case have been proper. Indeed, it does not appear by the papers whether there is or is not any regular communication by mail between New-York and Flushing. Probably such communication exists, and the omission so to state arises from the fact that the plaintiffs' counsel did not deem it material to claim that service by mail could or should have been made in this case. We desire to say on this point, that we are *not* prepared to say that where the attorney resides in one town and has his office in another, service of notices and orders and papers generally, may not regularly be made by mail, if service at his office be impracticable. And where the attorney has designated his *residence* on the process issued by himself, he may doubtless *require* that service of such papers, if not in fact duly made at his office, be made by mail addressed to him at such residence.

And where an attorney so situated, issues process or papers to be served, without adding any place to his name as his residence, then it is the most reasonable construction of the above sections and the rule of court, to say, that if his office be closed, the party desiring to serve papers, may either follow him out of town to his residence, or may serve the papers on him by mail, by directing them according to the best information which can conveniently be obtained concerning his residence; and that one or the other of these modes must be adopted; unless on inquiry with reasonable diligence, no information concerning such residence can be had.

So that in the present case, if the plaintiff's attorney had not added 195 Broadway to his name, the question, if it were not affected by the provisions of section 128, to be presently noticed, would be, had the defendants information, or could they have "conveniently" obtained information, concerning his

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residence? But where an attorney residing out of the city, keeps his office here, desires to secure the service of papers at his office, and in apparent compliance with rule 5th, adds the place to his name, a very different case is presented.

In *Rowell agt. McCormick*, (5 *Howard*, 337,) it was held by WELLES, Justice, that "an attorney has the right himself to decide where he resides, for the purposes of the rule, and that where he has so decided by a proper subscription, the adverse party is bound to conform thereto." If this proposition be followed out to its full extent, then service on the plaintiffs' attorney by mail, addressed to him at Flushing, would have been irregular and fruitless. It is not necessary that we should now so hold; but we do hold, that having subscribed his name and added a place, in compliance with the rule, the plaintiffs' attorney is himself concluded by his own designation. He cannot require that a party desiring to make service, should go or send out of town to make service on him, at any other place than that designated. As to him, it is as though the words "New-York," had been added to his name. And we apprehend, that had those words been used, it would hardly be claimed that the defendant was bound to serve papers in Flushing in any mode. If the terms "195 Broadway," were otherwise equivocal, they are made precise by the form of the summons itself, which in terms requires that the answer be served on the plaintiffs' attorney "at the city of New-York."

The subject has thus far been considered, as it was discussed on the argument, viz: as if the service of an *answer* in the cause was governed by no rules other than such as relate to notices, orders, and other papers. And thus considered, we conclude that the plaintiffs' attorney was bound by his own designation, and that the defendants' attorney was not bound to go or send out of the city of New-York. But in relation to an answer, the case is even stronger against the plaintiffs. Section 128 of the Code, provides that the summons shall specify a place within *this state*, and require the answer to be *there served*. And whatever be true in respect to other papers in the progress of a cause, it is by no means clear that a de-

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fendant can in any case be required to serve an answer either by mail or otherwise, at any place other than the place so designated in the summons. On the contrary, we incline to the opinion, that an answer served according to the express requirement of the summons, must be held regular, and that a plaintiff cannot require the defendant to look elsewhere for either the office or residence of the attorney.

It was, we think, the design of the legislature in prescribing this requisite of the summons, to furnish the defendant certain and reliable information of the *place*, the city, town or village, where service might be made, and that a defendant should not be put to inquiries respecting the place of service. Our conclusion is, that the defendants were not bound to serve an answer on the plaintiffs' attorney out of the city of New-York; that for the purpose of serving the answer, the city of New-York is to be taken, as against the plaintiffs, as the place for such service; and that the defendants had a right to treat the place designated, "195 Broadway," as the residence of the plaintiffs' attorney, for all the purposes of such a service—he having, in fact, no other residence in the city. How it would be if he had an actual residence in the city, 195 Broadway being his office only, it is unnecessary to consider.

New-York and 195 Broadway in New-York, being then a place which the defendants had a right to treat as the sole place for the service of the answer, it only remains to observe that they did all that it was possible to do to effect a service of the answer within the twenty days allowed therefor. Within reasonable hours on that day, they took the answer there. They could neither find a person there to receive it, nor obtain access thereto, in order to place it within the place designated. At an hour the next day, which was reasonable, they again presented it and it was refused. They were not bound to make an impracticable service. The service should, we think, be deemed good and sufficient. The views we have thus expressed, we think, find some support in *Walkins agt. Stevens*, (3 How. 28 ;) *Rowell agt. McCormick*, (5 How. 337 ;) *Falconer agt. Uccopell*, (2 Code R. 71.)

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Some statements in the affidavits, read in opposition to the motion, tend to show that the papers attempted to be served on the 27th of January, were not perfect copies, or fully completed; but we think the statements on that subject, in connection with the moving papers, are too indefinite and unsatisfactory to affect the result. We have not been insensible to the considerations which influenced the judge at special term, in retaining the judgment as security for what may ultimately be recovered.

The case made by the plaintiffs' affidavits, warrants a very serious apprehension that before a trial on the merits and judgment thereon, the property of the defendants may be so appropriated as to render the collection of the debt, (if a debt be established,) very doubtful. It is true that the defendants have not had an opportunity to contradict what is stated in those affidavits, but still the case made by the plaintiffs is such that if we had any discretion in the matter, we should be inclined to allow the judgment, execution and levy, to still stand as security. But we have no discretion. Having come to the conclusion that the judgment was irregularly entered, we are not at liberty to regard such considerations as are suggested by the plaintiffs' affidavits. It is our duty to set the judgment aside, and leave the plaintiffs to resort to other remedies by injunction or attachment, if they are advised that the evidence of an intent to defraud them, is such as to call for summary interference by those provisional remedies. The order appealed from must be modified. The judgment, execution and levy, must be set aside, and the plaintiffs be required to accept the answer, and pay the costs of the motion, at special term, fixed at ten dollars.

The costs of the appeal, (ten dollars,) may abide the event of the suit.

Ordered accordingly.

SUPREME COURT.

JOHN H. GREGG agt. WILLIAM T. READER and others.

When an *answer* contains a mere denial of the allegations of the complaint, or of some of its material allegations, and is duly *verified*, it should never be stricken out. (*The decisions pro and con upon this question reviewed.*)

Judges should not be anxious to assume the responsibility of deciding questions of fact, as to the truth or falsity of an answer, in this way.

Tioga Special Term, March, 1858.

THE answer in this case contains a denial of some of the material allegations of the complaint, and the answer is verified according to the requirements of the Code, and the plaintiff moves to strike out the answer as a sham answer, on the ground that it is false.

E. P. HART, *for motion.*

S. G. HATHAWAY, *contra.*

MASON, Justice. Whatever may be said as to whether an answer which merely denies the allegations of the complaint, and is not verified, can be stricken out on motion as a sham answer under the Code, I am of opinion that an answer verified as required by the Code, when such answer merely denies the allegations of the complaint, or some of the material allegations thereof, cannot be stricken out as a sham answer. I am aware that there are adjudged cases under the Code, which hold the contrary doctrine, but the opinion prevails pretty generally with the justices of this court, and in all the districts thereof, except one, that such an answer cannot be stricken out as sham upon the allegation that it is false, as will be seen by a reference to the adjudged cases. (*Davis agt. Porter, 4 How. R. 155; Darrow agt. Miller, 5 How. R. 247; Seward agt. Miller and Miller, 6 How. R. 312; White, Receiver agt. Bennett and others, 7 How. R. 59, 61; Livingston agt. Finkle and others, 8 How. R. 485; Benedict agt. Tanner, 10*

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How. R. 455; *Winne agt. Sickles*, 9 *How. R.* 217; *Grant agt. Power and others*, 12 *How. R.* 500; *Meir agt. Cartledge and others*, 8 *Barb. R.* 75; *Caswell agt. Bushnell*, 14 *Barb. R.* 393; 18 *W. R.* 565; 2 *Barn. & Cress.* 81; 4 *Bing. R.* 512.) Judges should not be anxious to assume the responsibility of deciding questions of fact, as to the truth or falsity of the answer, in this way. It is hardly proper to try such a question upon affidavits, and I have invariably adhered to the safer rule laid down in 2 *Cow. R.* 637, and 8 *Barb. R.* 78, 79, which is to suffer the answer to stand upon a very slight suggestion of its truth; a mere probability of its truth; some reason for believing it to be interposed in good faith, is sufficient to allow the answer to stand. And where the answer contains a mere denial of the allegations of the complaint, or of some of the material allegations, and is verified according to the requirements of the Code, I think the answer should never be stricken out, and such is the rule affirmed by all of the cases above referred to. This motion must be denied, but as there are reported cases, and several of them, which hold a contrary doctrine, and as we are not reported in this district, on the question, I am inclined to deny this motion without costs.

SUPERIOR COURT.

AUGUSTUS R. McDONOUGH agt. ISAAC N. PHELPS and JOHN J. PHELPS.

In the superior court of the city of New-York at any rate, no *attachment* can issue against a *foreign corporation* unless there is an action regularly commenced. That can be by a resident for any cause of action; (§ 427 of the Code;) but to render the suit effectual there must be *property* within the state, or the cause of action must have arisen therein.

The statute of 1845, authorizes a judgment and execution creditor to sue at law or in equity, in his own name, or in the name of the corporation, any debtor, or any stockholder, or several or all the stockholders, to compel the payment of any amount not paid in, or remaining due upon each share of the capital

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stock subscribed or held by them, or any of them, and may recover in such suit any sum (to the amount due to the plaintiff,) which such defendant would be liable to pay in any event in the state or government where such corporation is located.

The theory of the statute is, to give a right against shareholders, co-extensive with, and only co-extensive with the right of the corporation in the state in which it is located. If that corporation could sustain the action, it may be sustained under the statute; but not otherwise. And it must be an action which could be sustained in the state where the corporation is located.

Where the charter of a corporation created by and under the laws of the state of Connecticut, authorizes the directors to *require payment* of the subscription money, a debt is incurred which may be sued for independently of the cumulative remedy given of a *forfeiture* of the stock.

The plaintiff in this case, as a judgment and execution creditor of the Washington Stone Dressing Company, a corporation organized under the general law of Connecticut, regulating joint stock corporations, brought his action against the defendants, subscribers and shareholders of stock in such corporation, alleging fraud on the part of the defendants in making and carrying out a certain agreement between the defendants and other persons interested in the purchase of stock of said corporation, which fraudulent agreement as alleged, was contrary to the statute law of Connecticut, and demanded judgment for \$3,718.59.

Held, on demurrer, that to sustain the suit, the court must see that the following points are plainly established: 1st. That the corporation could, in Connecticut, succeed in such a suit. 2d. That it is clear the subscription of the stock in the manner charged was illegal. 3d. That it is clear it was incapable of ratification by the directors or stockholders; or if capable, has not been ratified. 4th. That a demand for payment in money can be supported, and that a forfeiture of the stock is not the only remedy, and, 5th. That such an action could be brought there, without making it on behalf of creditors at large, and against stockholders generally. And it is no objection to this view that some of the points suggested appear to be (though not really) matters of law.

The right to make calls upon members of a corporation and collect the amount of their subscriptions, is a franchise conferred by the state creating the corporation; and a franchise connected with property. The legality of the law of another state which deprives the corporation of this right without being heard in its assertion, is doubted.

New-York Special Term, May, 1856.

DEMURRER to complaint. The facts will appear in the opinion.

C. F. SANFORD, *for defendants.*

MR. ANDREWS, *for plaintiff.*

HOFFMAN, Justice. The material facts in the case are these:

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The plaintiff on the 12th of February, 1856, recovered a judgment in this court against the Washington Stone Dressing Company, for the sum of \$3,718.59.

This company was a corporation organized in December, 1852, under the general law of Connecticut, regulating joint stock corporations, passed in 1837. A certificate was filed in the office of the proper town clerk in Connecticut, pursuant to the provisions of the statute, by which the capital stock was declared to be \$100,000.

An execution was issued upon the judgment to the sheriff of the county of New-York, and returned unsatisfied. The defendants, partners in business under the name of I. N & J. J. Phelps, on the 15th December, 1852, subscribed, in their partnership name, for two hundred shares of the capital stock of such company, being for the sum of \$5,000. The defendants have not paid the amount of their subscription, nor any part thereof in money; but before the company was organized, it was agreed between them and certain other persons, to purchase certain patent rights for cutting, dressing or rubbing stone; that a company should be formed to have a capital of \$100,000; that the proposed purchasers should subscribe for \$50,000 of the same, and the patent rights so purchased should be assigned and transferred to the company, and should be in full of such subscription; and that the subscribers for the residue of such stock should pay their subscriptions in money.

The defendants and such other persons thereupon purchased the patent rights for \$10,000. The company was then organized, and the defendants and such other purchasers subscribed for \$50,000 of the capital, the two hundred shares of defendants being a part thereof; the remaining \$50,000 being subscribed by persons not interested in the purchase, and having no knowledge of the agreement.

The patent rights were then assigned to the company, and certificates of stock issued to, and received by the defendants and the other purchasers, to the amount of \$50,000, which certificates purported to represent stock fully paid in, and were not distinguishable from other certificates issued for stock, the

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par value of which had been paid in money; that the defendants' interests in the patents, for which the stock to the amount of \$5,000 was issued to them, had been actually purchased for the sum of \$1,000, and was not at the time of the transfer to the company, of greater value than \$1,000.

It is insisted that the agreement so made and carried out between the defendants and the other purchasers, was fraudulent, and contrary to the statute law of Connecticut. And the plaintiff demands judgment for the sum of \$3,718.59, with interest from the 14th February, 1856.

To this complaint a demurrer is interposed, that the complaint does not contain facts sufficient to constitute a cause of action.

The statute of Connecticut, which it is supposed bears upon the question, was by consent read upon the argument. The provisions which appeared at all pertinent, are the following: By the 197th section, the amount of the stock shall be fixed and limited in the articles of association, and shall in no case be less than \$4,000, nor more than \$200,000; and shall be divided into shares of twenty-five dollars each. The 208d section directs that the directors may call in the subscription to the capital stock by instalments, in such proportions and at such times and places as they shall think proper, by giving such notice as the by-laws shall prescribe; and in case of the neglect or refusal of a stockholder to make such payment for 60 days after the same is payable, and he notified thereof, the stock may be sold by the directors at public auction; the proceeds to be applied in payment of the instalment and expenses, and the residue paid to the owner.

The 210th section provides for making and recording of a certificate of incorporation, in which is to be stated the amount of the capital stock, the amount actually paid in, the names of the stockholders, and amount of stock respectively held by them.

By the 212th section, annual returns are to be made, showing the amount of capital actually paid in, the amount invested in real estate, the amount in personal estate, with their debts

and credits. And the 214th provides, that if the capital stock shall be withdrawn and refunded to the stockholders, before the debts for which such stock would have been liable are paid, the stockholders shall be responsible to any such creditor in an action founded on the statute, to the amount of the sum refunded to them respectively.

The system of proceeding against a foreign corporation in this state, originated in the Revised Statutes of 1830. The 15th and several subsequent sections of the act, (2 R. S. 459,) gave the right to sue, and prescribed the mode. The language in the 15th section is, that such suits may be commenced by attachment. The revisers refer to *McQueen agt. The Middletown Co.*, (16 John. 5,) as deciding that an attachment would not lie against a foreign corporation, under the absent debtor act; and to a decision in chancery, affirmed on appeal, that that court had no jurisdiction to attach its property.

The protection of our citizens required that some provision should be made to render such corporations amenable to our laws, and in our own courts. The sections had, therefore, been drawn in analogy to the act as to attachments against absconding and non-resident debtors. Accordingly the whole theory of the provisions is one of a process against property found in the state. But I do not understand that anything prevents the legislature from enacting that suits may be commenced in any other mode, which will operate upon foreign corporations, as much as upon individuals who are foreigners. Wherever a judgment could be obtained against the latter upon a sufficient notice, it may be so regulated as to be obtained against the former. Accordingly, the Code, (§ 134,) has provided that a summons may be served upon a president, director, &c., of such a corporation, in a case in which it has property within the state, or the cause of action arose therein. The 33d section and 427th confer jurisdiction on this court, and the last enlarges the cases of jurisdiction as to resident plaintiffs. They may sue for any cause of action.

The 227th, 228th and 237th sections also are consistent with the proposition that the action in cases of a foreign corporation

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is to be commenced in the ordinary mode by summons; indeed, that under the 127th section it cannot be commenced in any other mode. The 135th section provides for service by publication in an action against a foreign corporation, but only where it has property within the state, or the cause of action arose therein. By the act of March 15th, 1849, (*Sess. Laws, ch. 107*,) suits might be brought in the supreme court, superior court and court of common pleas, against a foreign corporation for the recovery of any debt or damages liquidated or unliquidated, arising upon contract made, executed or delivered, within this state, or upon any cause of action arising therein. Such suit might be commenced by a complaint and a summons together with an attachment, as now provided by law, and service may be made as provided by sections 113 and 114 of the Code. It is, of course, to be assumed that the judgment in the present case, was regularly recovered.

It appears to me, that in this court at any rate, no attachment can issue against a foreign corporation, unless there is an action regularly commenced. That can be by a resident for any cause of action, (§ 427;) but to render the suit effectual, there must be property within the state, or the cause of action must have arisen therein.

I am thus brought to the question first raised, whether the 36th section of the statute, (§ 1, *Laws 1845, ch. 234*,) can apply at all in the present case. In its strict letter it is only applicable when judgment has been obtained in a suit *commenced by attachment* against a foreign corporation. My conclusion is, as before stated, that in this court the suit cannot be commenced by attachment simply.

The 471st section of the Code does not appear fully to remove the difficulty. The Code is not to affect any special statutory remedy, not heretofore obtained by action, nor any existing statutory provisions relating to actions not inconsistent with the Code, and in substance applicable to the actions thereby provided. It also expressly preserves chapter eight of the Revised Statutes, in which attachments are provided for. But the act in question was not passed until 1845. It is pub-

lished in the revised third edition (of 1846,) as section 86. The court in the case of the *Bank of Commerce agt. The Rutland & Wash. R. R. Co.*, (10 *Howard*, 1,) treats the Revised Statutes, and the act of 1849 amending them, as still in force. But that does not touch the question of the act of 1845.

Leaving this question as one of doubt, I proceed to the examination of the provision of the act of 1845. The judgment and execution creditor may sue at law or in equity in his own name, or in the name of the corporation, any debtor, or any stockholder, or several or all the stockholders, to compel the payment of any amount not paid in or remaining due upon each share of the capital stock subscribed or held by them, or any of them, and may recover in such suit any sum (to the amount due to the plaintiff,) which such defendant would be liable to pay in any event, in the state or government where such corporation is located.

The theory of the statute, I apprehend, is this; to give a right against shareholders, co-extensive with, and only co-extensive with the right of the corporation in the state in which it is located. If that corporation could sustain the action, it may be sustained under the statute; but not otherwise. It is clear, also, that it must be an action which could be sustained in Connecticut.

Then I am to ascertain that by the law of Connecticut, precisely the present action in its present form could be sustained by the corporation or by the present plaintiff, in that state. The very first question then would be, whether the defendants if sued in Connecticut by the company, might not avoid any judgment by a forfeiture of the right to any stock?

In our state, the law finally resulted in the rule that where a subscription involved a promise to pay the amount, an action could be sustained although a forfeiture of the stock on non-payment was allowed. The remedy was cumulative. (*Troy R. R. Co. agt. McChesney*, 21 *Wend.* 296; *Herkimer Co. agt. Small*, *id.* 274; *Same agt. Same*, 2 *Comst.* 330; *Morris Canal Co. agt. Notham*, 2 *Hall*, 240; *Harlem R. R. Co. agt. Seixas*, *id.* 509.)

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The law in Massachusetts is the same upon the same circumstances. (*Salem Co. agt. Roper*, 6 *Pick.* 31.) But in that state if there is no express contract to pay, nor liability created by statute, no action will lie on the implied assumpsit. The forfeiture is all that the company is entitled to. (*Andover Co. agt. Gould*, 6 *Mass.* 42; *Middlesex Tr. Co. agt. Swan*, 10 *id.* 587; *Chester Glass Co. agt. Dewey*, 16 *Mass.* 94.) And the same is the law in New-Hampshire. (*Franklin Co. agt. Alexander*, 2 *N. H. Rep.* 380;) of Pennsylvania; (*Canal Co. agt. Janison*, 1 *Binney*, 70;) and of Georgia, (8 *Georgia Rep.* 486.) In Vermont, assumpsit was sustained on a subscription payable in cash or grain, there being no law of the state permitting a sale upon a forfeiture. (*Essex Bridge Co. agt. Tuttle*, 2 *Vermont Rep.* 393.)

As far as I can ascertain the law of Connecticut, it is this: Where the charter authorizes the directors to *require payment* of the subscription money, a debt is incurred which may be sued for independently of the cumulative remedy given of a forfeiture of the stock. (*Hartford R. R. Co. agt. Kennedy*, 12 *Conn.* 499; *Ward agt. Griswold M. Co.*, 16 *id.* 593.) In the *Danbury & Norwalk Co. agt. Wilson*, (22 *Conn.* 452,) the rule in that state is thus stated, that "by the subscription of a person to the stock of a railroad corporation, of the number of shares annexed to his name, on the terms, conditions and limitations mentioned in the charter, and the allowance to him of the shares so subscribed, the relation of stockholder and company, as between him and the corporation, is created, from which the law implies a promise by him, to pay instalments ordered by the directors pursuant to the charter." (*The Hartford & New-Haven R. R. Co. agt. Kennedy*, 12 *Conn. Rep.* 499.)

I am not then prepared to say whether by the law of Connecticut, there would be a remedy other than forfeiture in this case. The language of the 208th section is, that the directors *may call in* the subscription to the capital stock in such proportions, and at such time and times as they shall think proper, and in case any stockholder shall neglect or refuse payment, after a notice as prescribed, the stock shall be sold at

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public auction, and the proceeds first applied in payment of the instalment called for, and expenses, and the surplus refunded to the owner.

It may be that this provision is not equivalent to an authority to *demand payment* of the subscription. It may be that the principles of the valuable case of the *Kennebec &c., R. R. Co. agt. Kendall*, (31 *Maine Rep.* 610,) would govern this case. An agreement to subscribe to the stock for a given number of shares did not create a personal liability; neither the charter nor any statute imposed such liability, and it did not arise from the agreement. See also the observations of the court, upon the case of *The Hartford & New-Haven Co. agt. Kennedy*, (12 *Conn. Rep.* 499.)

It is true that by the law of several states, upon a judgment and execution returned unsatisfied against a company, the creditor may sustain an action to compel payment of the amount of unpaid subscriptions to satisfy his demand. Such is the case in Ohio, (*Henry agt. The Vermilion R. R. Co.*, 7 *Ohio Rep.* 187;) in Alabama, (*Allen agt. Montgomery R. R. Co.*, 11 *Alb. Rep.* 437;) in Maryland, (*Hall agt. U. Ins. Co.*, 5 *Gill*, 484;) in South Carolina, (*Haslett agt. Wotherspoon*, 1 *Strob. Eq. Rep.* 209;) and in Georgia, (*Hightaver agt. Heaton*, 8 *Georgia*, 486.) And in the case in Ohio, it was held that an agreement to secure to any stockholder the privilege of paying up in store goods, or otherwise except in money, was a fraud upon other stockholders, and payment in money might be enforced.

In our own state a similar proceeding was taken in the leading case of *Slee agt. Bloom*, (19 *John. Rep.* 456.) But in *Mann agt. Pentz*, (3 *Comst.* 415,) it was held under the Revised Statutes, (2 *R. S.* 463, § 42, (36),) that the proceedings under a judgment to sequestration, does not effect at once a dissolution of the company; that a receiver under this section could not sustain a suit against a stockholder who had paid up all the calls. He merely represented the company, and could collect only its assets proper. But he could sustain an action to recover unpaid calls from delinquent stockholders. The capital

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stock of a corporation is a trust fund for payment of its creditors.

No such action, however, could be sustained except in equity, by taking an account of the assets and debts, and making all the delinquent shareholders parties, and such a bill was to be filed by the creditor on behalf of himself and all others, not by the receiver. Some other authorities in other states may be usefully noticed.

In *Mann agt. Cook*, (20 Conn. Rep. 178,) it was decided that a receiver appointed by a court in New-York of a company organized in that state, could sustain an action against a stockholder resident in Connecticut, to compel him to pay up the amount of his unpaid subscription. The plaintiff as representative of the creditors, could bring a suit. That the directors could not receive a subscription at less than the par value of the stock, under a private arrangement. It would operate as a fraud upon creditors and other stockholders.

(*Sackett's Harbor Bank agt. Blake and others*, 3 Rich. Eq. Rep. 226.) The Jefferson Woolen Company was incorporated by the state of New-York, and Ann Izard, who afterwards married the defendant Blake, became a stockholder. The corporation made two notes, which were discounted by the plaintiffs. The property of the company was afterwards sold on execution, and it became dissolved.

The act of New-York of 1811, as to the individual responsibility of stockholders upon a dissolution and insolvency, was in the case. The bill charged an application to other stockholders, and that they had already paid the amount they were bound to contribute; that there were no other members known to the plaintiffs from whom a recovery could be had; that the defendants had not paid anything towards the debts of the company. These material facts it is stated, were proven. The bill was to enforce the payment of the plaintiff's demand. The court held, that the act of New-York, impairing a personal responsibility of stockholders in derogation of the common law rule, was valid.

2d. That the interpretation of the act given by the tribunals

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in New-York, would be adopted in Virginia. 3d. That these decisions settled that a case of dissolution had occurred. 4th. That the other stockholders need not be joined. And a decree for the amount of the subscription (deducting a certain sum paid before on account of debts,) was made. In these cases, we find the principle that the tribunals of other states will enforce against a resident stockholder the same rights which the company, its creditors or representative, could have enforced against him, in the state which created the corporation.

After some hesitation, I consider that the last clause of the act of 1845, involves the proposition that if an action could not be sustained in Connecticut without making all the stockholders parties, for a general account and distribution, it cannot be supported here. How that is, does not appear. It would be singular that a separate action could be allowed which could not be permitted against a domestic corporation, nor in Connecticut itself, if the law be similar there to what it is here.

My conclusions are, that to sustain a suit, the court must see that the following points are plainly established; that the corporation could, in Connecticut, succeed in such a suit; that it is clear the subscription of the stock in the manner charged was illegal; that it is clear it was incapable of ratification by the directors or stockholders, or if capable has not been ratified; that a demand for payment in money can be supported and that a forfeiture of the stock is not the only remedy, and that such an action could be brought there without making it on behalf of creditors at large and against stockholders generally.

Nor is it an objection to this view, that some of the points suggested appear to be matters of law. These are, however, in truth, matters of fact. The question is, could the suit be supported in Connecticut by the corporation? That is a question of fact, and the law of Connecticut is matter of fact for us, as much as the other matters purely and admittedly such.

There is one other view of this case which may deserve seri-

ous consideration. A corporation is a creation of the law of the state adopted for the promotion of its internal prosperity or regulation ; among its franchises is everything which regards its management, the obligations of its members, their relations among each other, and to the aggregate body. The right to make calls upon such members and collect the amount, is a franchise conferred by the state ; and a franchise connected with property. I doubt the legality of the law of another state which deprives the corporation of this right without being heard in its assertion.

Judgment for the defendants on the demurrer with costs, and liberty to amend the complaint in twenty days, as advised.

SUPREME COURT.

In the Matter of the Petition of CHARLOTTE MARSAC and
EMILY MARSAC and others, infants, &c.

A report of a referee, "that in his opinion it would be proper to allow said infants to prosecute an action for the partition or sale of the real estate mentioned in the petition," is not sufficient to warrant the court in ordering proceedings in such an action. Under the statute, the *facts* which warrant such a conclusion, should be set forth in the report.

Brooklyn Special Term, September, 1856.

APPLICATION by infants on petition, for partition and sale of premises.

BIRDSEYE, Justice. The 2d section of chap. 277 of the laws of 1852, directs that the authority prayed for in this petition shall not be given, and that no partition or sale shall be directed by the court, "unless it shall be made satisfactorily to appear that the interests of such infant require such partition or sale."

I do not find in the papers before me, any evidence whatever that the interests of these infants cannot be sold for their full value, in the manner by which alone they could have been sold prior to the act of 1852. If such a sale can be effected, the whole expense of a partition suit will be saved. If, however, that cannot be done, it will be easy to make the fact appear; as by showing that the co-tenants have been applied to, to purchase and have refused, or that they are unable, or that they had notice of the proceedings before the referee, &c.

The order of reference heretofore made in this matter is not presented to me. But before the court can grant such application as this, I think there should be something more than the mere statement of the referee, "that in his opinion it would be proper to allow said infants to prosecute an action for the partition or sale of the real estate mentioned in the petition." Under the statute cited, the facts which warrant such a conclusion, should be set forth in the report; that the court may judge upon them whether the necessity exists for a proceeding so protracted and expensive as that here sought to be instituted.

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SUPREME COURT.

THE PEOPLE *ex rel.* JAMES McDONALD agt. THE COURT OF
SESSIONS OF WAYNE COUNTY.

The district attorney and the counsel for the defendant settled a bill of exceptions on this wise: (Title of the cause.) "Having examined the annexed bill of exceptions, and found the same to be in all things correct, we stipulate that the same be and hereby is settled without presentation to the court." Dated, &c., and signed.

The bill of exceptions was soon afterwards presented to, and signed and sealed by the two associate justices of the court of sessions, who with the county judge, composed the court at which the trial was held. Soon after this, a change took place in the office of the district attorney.

The bill of exceptions was then presented to the county judge to be signed and sealed by him; he declined doing so, and indorsed thereon a certificate or statement in writing, as follows: "Having been applied to, to sign the within bill of exceptions, and also to sign the above certificate, I have declined to do so for the reason, the charge to the jury is not correctly set out in the bill, and I decline to sign it without the correction." The certificate referred to was to the effect that the bill of exceptions had been examined, and that it was expedient to take the judgment of the supreme court thereon.

Subsequently a justice of the supreme court made and indorsed on the bill of exceptions a certificate to the same effect as that last referred to, and the bill of exceptions with the said certificate was filed with the county clerk; and the district attorney as such, was requested to sue out a writ of *certiorari* to remove the case into the supreme court.

Afterwards the district attorney served on the relator's counsel a notice of a motion to be made in the court of sessions, for an order amending said bill of exceptions by incorporating therein the charge of the county judge as delivered to the jury, and for the re-settlement and re-signing of the bill, on the ground that the rulings of the court, and the charge to the jury, were incorrectly stated in the bill, and for such further order, &c.

This motion was made upon the bill of exceptions as filed, and on the minutes of the court alone, and opposed on the ground: 1st, That no papers had been served as a basis of the motion, (the court decided to hear the motion.) 2d, That the bill of exceptions was not shown to be incorrect: and 3d, That the court of sessions had no power to alter, amend, re-settle or interfere with the bill of exceptions. The court of sessions made an order that the motion be granted, and that the district attorney serve a copy of the amendment proposed to the bill on the relator's counsel with ten days' notice of settlement, the bill to be settled at the then next term of the court of sessions.

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Subsequently the relator's counsel moved to vacate said last-mentioned order, which motion was denied.

Afterwards an order was granted by the supreme court at special term that said court of sessions show cause why a writ of mandamus should not issue, commanding said court to vacate and annul said order directing the re-settlement of the bill of exceptions.

Held, 1st, That the court of sessions had the power to order a re-settlement of the bill of exceptions, notwithstanding the settlement and agreement made and signed by the (former) district attorney, and the relator's counsel, and signed by a majority of the court, and filed with the clerk.

Held, 2d, That the objection that the order for re-settling the bill of exceptions should be vacated and set aside, as made without any evidence before the court to justify it, and that the evidence produced by the relator, on the motion, showed clearly that the bill of exceptions had been fairly and truly settled, was answered by the fact, that it was claimed that the court of sessions was in possession of evidence showing the incorrectness of the bill of exceptions, viz: the minutes kept on the trial by the county judge, in which the charge to the court as delivered to the jury, was drawn out at full length, which differed materially from the charge stated in the bill of exceptions as settled, which was supported by the affidavit of the county judge, read in opposition to this motion.

Held, also, that the objection that this evidence or copies of papers containing it, was not served upon the relator or his counsel, before the motion for re-settlement was made, or read in opposition to the motion, should not be entertained on this motion (for a *mandamus*), unless it was made to appear that some legal vested right of the relator had been denied or violated by reason of the omission complained of. (*Cases defining the powers and duties of the court on mandamus referred to.*)

It seems, that the court of sessions have no established positive rules of practice to govern them. They are not necessarily governed by the rules which have been established to regulate proceedings in civil actions in the supreme or any other court.

Wayne Special Term and Circuit, Oct. 1857.

MOTION for a writ of mandamus.

The relator was indicted in the court of oyer and terminer, for Wayne county, for obtaining goods by false pretences. The trial came on at the sessions for the same county, held in September, 1856, to which court the indictment had been sent, upon which trial the relator was convicted. Various exceptions were taken, on the part of the relator, to the rulings of the court of sessions in the progress of the trial, and to the charge of the court to the jury.

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A bill of exceptions was afterwards prepared, and served upon the district attorney, who proposed several amendments thereto. Afterwards, and on the 23d day of December, 1856, the relator's counsel and the district attorney settled the bill of exceptions, and entered into a stipulation in writing, and annexed the same to the bill of exceptions as thus settled, in the words and figures following :

"Wayne County Sessions. *The People* agt. *James McDonald*. Having examined the annexed bill of exceptions, and found the same to be, in all things, correct; we stipulate that the same be, and is hereby settled without presentation to the court. Dated December 23, 1856.

"J. WELLING, *Dist. Atty., Wayne county.*

"WILLIAM CLARK, *of counsel for defendant.*"

The bill of exceptions was soon afterwards presented to, and signed and sealed by the two associate justices of the court of sessions, who, with the county judge, composed the court at which the trial was had. Mr. Welling's term of office of district attorney, expired on the last day of December, 1856, and on the first day of January, 1857, Mr. J. Harrison became, and has continued up to this time, the district attorney of said county. When the bill of exceptions was presented to the county judge to be signed and sealed by him, he declined doing so, and indorsed thereon a certificate or statement in writing as follows :

"Having been applied to, to sign the within bill of exceptions, and also to sign the above certificate, I have declined to do so, for the reason, the charge to the jury is not correctly set out in the bill, and I decline to sign it without the correction." The certificate referred to was to the effect, that the bill of exceptions had been examined, and that it was expedient to take the judgment of the supreme court thereon.

On the 3d day of February, 1857, a justice of the supreme court, made and indorsed on the bill of exceptions a certificate to the same effect as that last referred to, and the bill of exceptions with the said certificate, was filed with the county clerk of Wayne county; and Mr. Harrison was as such dis-

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trict attorney, requested to sue out a writ of *certiorari* to remove the case into the supreme court. Afterwards, and in February 1857, said district attorney served on the relator's counsel a notice of a motion to be made in the court of sessions on the 3d Tuesday of February, 1857, for an order amending said bill of exceptions by incorporating therein the charge of the county judge as delivered to the jury, and for the re-settlement and re-signing of the bill, on the ground that the rulings of the court, and the charge to the jury, were incorrectly stated in the bill, and for such other or further order as to the court should seem proper.

The notice stated that the motion would be made upon the bill of exceptions as filed, and on the minutes of the court kept on the trial; no papers or copies of papers accompanied the service of the notice, nor were any served at any time as the basis of the motion. On the 3d Tuesday of February, 1857, the motion was made by the district attorney, pursuant to such notice, when the relator's counsel objected to the hearing of the motion, on the ground that no papers had been served as a basis of the motion. The court decided to hear the motion, whereupon the relator's counsel objected to the granting of the motion, on the ground that the bill of exceptions was not shown to be incorrect, and on the further ground that the court of sessions had no power to alter, amend, re-settle or interfere with the bill of exceptions. The district attorney, on making the motion, did not read any affidavit or offer any proof to show that the bill of exceptions was incorrect in any particular. The relator's counsel, on the hearing of the motion, read affidavits of four persons tending to show the accuracy of the bill as settled. The court of sessions thereupon, after hearing the district attorney and the counsel for the relator, made an order that the motion be granted, and that the district attorney serve a copy of the amendments proposed to the bill of exceptions on the relator's counsel, with ten days' notice of settlement, the bill to be settled at the then next term of the court of sessions.

At the term of said court, held in May, 1857, the relator's

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counsel moved to vacate said last-mentioned order, which motion was denied.

At a special term of the supreme court, held in the county of Wayne, in July, 1857, an order was granted, that the said court of sessions show cause at this term why a writ of mandamus should not issue, commanding said court to vacate and annul said order directing the re-settlement of the said bill of exceptions.

The counsel for the relator now moves that the order to show cause be made absolute, and that a writ of mandamus issue accordingly. In opposition to the motion, the affidavit of the county judge is presented, showing that he delivered the charge to the jury on the trial of the indictment, by reading the same from his minutes, said charge having been written out by him, while the counsel were summing up the cause to the jury. Annexed to this affidavit is a paper which the affidavit states to be a true copy of all the material parts of the charge as delivered to the jury on the trial of said indictment, which, on examination, is found to differ essentially from the charge as contained in the bill of exceptions.

WILLIAM CLARK, *for the relator.*

J. HARRISON, *Dist. Atty. &c., for the defendants.*

WELLES, Justice. The first question to be considered, is, whether the court of sessions had the power to order a re-settlement of the bill of exceptions. Such power is denied by the counsel for the relator. The Revised Statutes provide that on the trial of any indictment, exceptions to any decision of the court may be taken by the defendant in the same cases and manner provided by law in civil cases; and a bill thereof shall be settled, signed and sealed, and shall be filed with the clerk of the court, and returned upon a writ of error as authorized in personal actions, or upon a *certiorari* as therein-after provided, and the same proceedings may be had to compel the signing and sealing of such bill, and the return thereof. (2 R. S. 736, § 21.) The provisions in relation to civil

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cases, are to be found in 2 *R. S.* 422, 423, §§ 73 to 81 inclusive; among other things, it is there provided that the exceptions must be made at the time the decision complained of is made, or if the exception is to the judge's charge, it must be made before the jury shall have delivered their verdict; that the exceptions shall be in writing, but the court may allow a reasonable time to settle and reduce the same to form. If the truth of the case be fairly stated in the exceptions, it is the duty of the person or persons composing the court, or a major part of those who were present when the decision complained of was made, to sign and seal such statement. It is contended on the part of the relator, that as the bill of exceptions was, on the 23d day of December, 1856, settled and agreed upon by the relator's counsel and Mr. Welling, who was then the district attorney, and afterwards duly signed by a majority of the members of the court, and filed with the clerk, the matter had passed beyond the power or control of the court, who had no right to interfere and order the re-settlement. To this, however, I cannot assent; I am not willing to sanction the doctrine that the court of sessions are destitute of the power in question. The bill of exceptions remained in the court where the trial was had, to which it related, in the immediate custody of the clerk, their officer, and had not passed beyond their control. If it had been sent to the supreme court as part of the return to a *certiorari*, that court would have had the power upon application, to send it back to the sessions for correction and amendment, and by parity of reasoning, the sessions would necessarily have the power of correction and amendment, before they had sent it to the supreme court. The supreme court would not order the amendment, but would, upon a proper case being presented, remove the obstacle in the way of the sessions doing it, by remitting it back for them to exercise their discretion upon the question. While it remains with the sessions, no such exercise of power by the supreme court is necessary. The power in question is inherent in the court, as a necessary attribute for the dispensation of justice. If it were not so, there would be presented a melancholy defect

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in our system of jurisprudence, both civil and criminal. Suppose the case of a bill of exceptions, regularly settled, signed and filed in a capital case, and it should be afterwards discovered, that an exception duly taken at the trial, which would be conclusive in favor of the defendant, had been inadvertently or for any other cause, omitted in the bill. If the doctrine contended for is to prevail, there would be no remedy for the defendant, who, it might be, would forfeit his life as the consequence. Such a case is supposable, and although a strong one, serves to illustrate the fallacy of the position assumed by the counsel for the relator. If the power in question may be exercised in favor of a defendant, no good reason exists, why it may not be exercised against him, where the justice of the case demands it.

Another position taken in behalf of the relator, is, that admitting the existence of the power in the abstract, yet, in this case, it was irregularly and arbitrarily exercised; that the order for re-settling the bill of exceptions was made without any evidence before the court to justify it; and that the evidence produced by the relator on the motion, showed clearly that the bill of exceptions had been fairly and truly settled.

The notice by the district attorney, of the application for the order, stated that such application would be founded upon the bill of exceptions on file, and the minutes of the court kept on the trial. The affidavit of the relator's counsel, states, in substance, among other things, that no paper was read or produced by the district attorney on the motion, or any evidence furnished by him, tending to impeach the accuracy, regularity or truthfulness of the bill of exceptions as settled, and that as such counsel he objected to the order for re-settlement, on that, among other grounds. This statement is not denied on the part of the court of sessions. It is claimed, however, that the court was in possession of evidence showing the incorrectness of the bill of exceptions, viz: the minutes kept on the trial by the county judge, in which the charge of the court, as delivered to the jury, was drawn out at full length, which differs materially from the charge stated in the

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bill of exceptions as settled ; and this is supported by the affidavit of the county judge read in opposition to the present motion. The objection that this evidence, or copies of papers containing it, was not served upon the relator or his counsel, before the motion for re-settlement was made, or read in opposition to the motion, should not be entertained on this motion, unless it is made to appear that some legal vested right of the relator has been denied or violated by reason of the omission complained of. In the case of *The People ex rel. Oebrieks agt. The Superior Court of the city of New-York*, (5 Wend. R. 114,) SUTHERLAND, J., in delivering the opinion of the court on the subject of the powers and duties of the court on mandamus, amongst other things, says: "We will not interfere with that portion of the practice of inferior courts, which does not depend upon established principles, or is not regulated by fixed rules. We will not compel them to open, or prohibit them from opening a default upon the usual terms, as a general rule ; because applications are founded upon special circumstances, which may impress different individuals very differently. There is no fixed standard by which we can say the inferior court has erred. We may think so, but that is not sufficient.

"But if an inferior court should deny to a party the benefit of an established general rule of practice, not depending at all upon circumstances, I apprehend we should interfere. * * * Although it might rest entirely in their discretion whether they would retain the rule or not, still, as long as it was retained, it would be binding upon them. It conferred legal rights upon their suitors which they had no power to withhold from them. They would have parted with their discretion, and substituted in its place a clear and well defined rule ; and the usage of courts may confer rights upon parties, and impose obligations upon themselves as sacred and imperative as written rules. The only difference is in the evidence of their existence. No court has the right, arbitrarily, to change its established course of proceedings in relation to a particular case."

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The foregoing extract contains a clear and correct exposition and illustration of the law touching the powers and duties of the supreme court to be exercised through the writ of mandamus, in regard to the proceedings of inferior courts; and while I concur in the views of the learned justice as above expressed, it is proper to say that in my judgment it carries the power of the court to its utmost verge. Judging the present case by the principles thus enunciated, I cannot entertain a doubt that it is one in which this court ought not to interfere with the action of the sessions in the present state of the proceedings before them. The court of sessions have no established positive rules of practice to govern them. They are not necessarily governed by the rules which have been established to regulate proceedings in civil actions in the supreme or any other court. For example, they are not bound to require of a defendant or district attorney, to give eight days' notice of a motion as in the supreme court. It is the constant practice of the courts of oyer and terminer, and courts of sessions, to entertain motions of every description, and to proceed to the trials of indictments without any notice whatever. There are, doubtless, cases, where a notice would be eminently proper, and where it would be the duty of the court to require that the party should have reasonable notice, and where, by reason of the court neglecting such duty, the party would be deprived of a clear legal right, and in which it might be the duty of this court to interfere by mandamus.

In the case at bar, the relator has not, as yet, been deprived of any right. It certainly is not his right to retain the bill of exceptions, unless *the truth of the case be fairly stated* in it. The order complained of does not settle the bill in any way. It merely orders it re-settled. It must be settled so that the truth of the case be fairly stated. It should contain so much of the evidence as to present the rulings of the court to which the exceptions relate. If this shall be done upon the re-settlement, and the rulings, charge of the court to the jury, and the exceptions thereto, shall be truly stated, the relator will be deprived of no right. It will be time enough for him to complain when

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the bill of exceptions is so re-settled as to fail in fairly stating the truth of the case.

It is contended that the settlement already had, followed by the signing and sealing by a majority of the court of sessions with the assent of the then district attorney, through whom alone the people could be heard, together with the affidavits read in opposition to the motion for re-settlement, establish a clear right in the relator to have the trial reviewed upon the exceptions as so settled. There is reason to believe that the two justices of the court of sessions who signed the bill, were influenced to do so mainly by the stipulation of the district attorney, and the defendant's counsel. It would be natural, under such circumstances, for them to do so, without looking carefully into the contents of the bill. Such is the general, though not the invariable practice of the justices of the supreme court in civil actions under similar circumstances; and in this case the district attorney who subscribed the stipulation as well as the relator's counsel, undoubtedly believed it substantially correct; and in denying the present motion, I am not to be understood as deciding the question whether the bill of exceptions was properly settled or not. That is a question to be determined by the court of sessions upon the re-settlement. If it were necessary now to consider that question, it might be said with great propriety, that it does not appear that any one, excepting the county judge, took minutes of the trial during the time the same progressed; that it is shown that the charge of the court to the jury, was written out at length by the county judge upon his minutes, while the defendant's counsel was summing up the case to the jury, which charge was materially different from that inserted in the bill of exceptions as the charge of the court; that the affidavits in support of the accuracy of the bill of exceptions as settled, were all made in February, 1857, some five months after the trial, and the facts they contain are stated from recollection; and that upon the question of what the charge in fact was, the minutes made at the time by the judge who delivered it, is far more reliable than affidavits thus made. The

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fact that the record of the charge upon the minutes of the county judge was not read upon the motion to re-settle the bill of exceptions, constitutes no sufficient ground for the present motion. The fact was necessarily before the court in their minutes of the trial, and in my judgment, it was entirely proper for them to refer to their minutes for the purpose of seeing whether the truth of the case had been fairly stated.

For the foregoing reasons, the motion for a mandamus is denied, and the order to show cause, discharged.

NEW-YORK COMMON PLEAS.

LEVY agt. ELY and others.

A complaint verified by the plaintiff in the manner prescribed by the Code, is an affidavit upon which an injunction may be granted, if the material facts are alleged positively, and not on information and belief.

The cause of the conflict of decisions upon this question pointed out by counsel. The complaint stated that a draft was drawn on defendants; that they accepted it; that the payee indorsed it; then set out a copy of the draft and acceptance, and then averred that defendants were indebted to the plaintiff thereon in a specified sum; *held*, that this was a sufficient statement of facts to constitute a cause of action.

What is sufficient evidence of insolvency to authorize an injunction and appointment of a receiver, in an action by a creditor of a partnership on an indebtedness of the firm.

Special Term, February, 1858.

MOTION to continue a temporary injunction, and for the appointment of a receiver.

C. BAINBRIDGE SMITH, *for the plaintiff*, insisted,

I. The complaint is sufficient, as well in setting forth the cause of action, as for the purposes of obtaining and continuing an injunction.

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1. The complaint in setting out the defendants' indebtedness, complies with section 162 of the Code. (See *Allen agt. Patterson*, 8 *Seld.* 476.)

2. The complaint, being verified and the allegations made unqualifiedly, is to all intents and purposes an affidavit. The conflict of decisions upon this point is in consequence of an amendment of the Code, and the verification of the complaint, and a misapprehension of its effect. The section requiring an affidavit to obtain an injunction is the same as the Code of 1848; and under that Code, the verification to the complaint was to the effect that the party making it believed it to be true; hence, an affidavit, in addition to the complaint, was then required. (*Code of 1848*, §§ 133, 193; *id.* 1857, §§ 157, 220.)

II. The defendants are a limited partnership formed under and pursuant to the Revised Statutes, and have become insolvent. An injunction and receiver will be granted at the instance of one of the creditors in such case. The action is commenced on behalf of the plaintiff, and all other creditors of the defendants. (*Innes agt. Lansing*, 7 *Paige R.* 583; *Haggerty agt. Taylor*, 10 *id.* 261; *Whitewright agt. Stimpson*, 2 *Barb.* 377; *La Chaise agt. Lord*, 10 *How. Pr. R.* 461.)

GEORGE W. PARSONS, *for the defendants.*

HILTON, Justice.. The plaintiff, as a creditor of the defendants' firm—a limited partnership formed pursuant to the provisions of the Revised Statutes in respect thereto—brings this suit as well on his own behalf as of all other creditors who will come in and contribute to the expenses of the prosecution.

It is alleged in the complaint that the defendants made a certain acceptance, a copy of which is given; that the payee indorsed it; that the defendants are indebted to the plaintiff therein in an amount specified; that they are a limited copartnership, are insolvent, and have neglected to place their assets in the hands of a trustee for distribution among their creditors.

On this complaint, an order to show cause why a receiver

should not be appointed of the property of the firm, and the defendants be enjoined from disposing of it, &c., was granted.

On the argument, the defendants' counsel presented preliminary objections, which will be here noticed.

1. That the complaint is not an affidavit within the meaning of that term, as used in the Code, (§ 220,) upon which a judge is authorized to grant an injunction.

2. That the complaint does not sufficiently show a right of action against the defendants, to entitle the plaintiff to any relief upon this motion, because it does not allege that the acceptance sued upon and set out in the complaint, "was indorsed and delivered to the plaintiff, and that he is the owner and holder of it."

In respect to the first objection. The complaint is verified in the manner required by the Code. The verification is to the effect that, to the knowledge of the plaintiff, all the positive averments and statements in the complaint are true; and all the allegations and averments therein stated to be made upon information and belief, he believes to be true; and that he is informed and believes the information to be true; not that he believes the matters so stated to be true. (*Code*, § 157.)

It would seem difficult to conceive of a more positive manner of verifying statements to be used in judicial proceedings, than is here required. The verification is itself an affidavit, duly signed and sworn to by the party making it—within it should be deemed incorporated the statements in the pleading to which it refers; and thus it constitutes the entire pleading not only an affidavit in form, but in substance.

The legislature in enacting the Code of Procedure, declared by its title that it was, "An act to simplify and abridge the practice, pleadings, and proceedings of the courts of this state;" and however much the profession may differ upon the question, whether it has accomplished the purpose thus expressed, yet there can be no doubt that courts are bound to so construe its provisions as to effect, as far as possible, the end contemplated.

To require a party, who has in the most solemn manner

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verified the statement in his pleading, to verify the same matter in the shape of an affidavit before he can be allowed an injunction, would certainly be neither a simplification nor abridgment of the practice or proceedings, nor is it necessary.

The conclusion arrived at is, that a complaint verified by the party, in the manner required by the Code, is an affidavit upon which an injunction may be granted, if the facts are alleged in a sufficiently positive manner. (*Woodruff agt. Fisher*, 17 *Barb.* 229.)

As to the second objection. The complaint states that a draft was drawn upon the defendants; that they accepted it, and the payee indorsed it. A copy of the acceptance is then given, followed by an averment that the defendants are indebted to the plaintiff therein in an amount specified. All the remaining allegations are for the purpose of obtaining the equitable relief applied for.

Nothing more would seem to be needed to enable the defendants to discover the foundation of the action brought against them, nor is more required. (*Code*, §§ 142, 162; *Allen agt. Patterson*, 3 *Seld.* 476; *Burrall agt. De Groot*, 5 *Duer*, 379.)

These objections being disposed of, a brief examination of the affidavit of one of the defendants, introduced in opposition to the complaint, will suffice to show the grounds upon which the decision of this motion is based. It is not denied that the defendants are a limited partnership; that they made the acceptance; and that the plaintiff is a creditor of the firm; and, indeed, it may be said that the insolvency is not denied, although it is in words, but not in substance. It appears that their debts are about \$625,000, and their assets nominally about \$750,000. The value of these assets, it seems, cannot be ascertained with any certainty; but they are compromising with their creditors upon the best terms that their property, in their opinion, will warrant.

That they have suspended payment on their liabilities, and pay nothing in full, except such small claims as would be

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pressed to judgment, if the parties were not settled with. That these payments are thus made to protect the property of the firm, and prevent its being sacrificed by placing its management in other hands than their own.

If this is not evidence of insolvency, it would be difficult to determine what would be. Therefore, we have all the facts admitted which by frequent adjudications have been determined to be sufficient to entitle the plaintiff to the relief he asks for. (*Innes* agt. *Lansing*, 7 *Paige*, 583; *Whitewright* agt. *Stimpson*, 2 *Barb.* 379; *Haggerty* agt. *Taylor*, 10 *Paige*, 261; *La Chaise* agt. *Lord*, 10 *How. Pr. R.* 461.) And however much it may be made to appear that the interests of the plaintiff would be better served and protected by permitting these defendants to proceed in their careful and judicious administration of the affairs of their partnership; yet the court cannot and ought not to deny the plaintiff a legal right, where his proceedings are in the form prescribed by law.

It follows that the motion must be granted, and an order of reference will be taken to H. W. Robinson to appoint a receiver, the injunction now existing to be continued.

SUPREME COURT.

PHILO DAUCHY and SAMUEL W. DAUCHY agt. OSCAR TYLER.

This case is reported for the sole purpose of exhibiting the views of the judge on the subject of allowing *amendments of pleadings on the trial*; and to apprise attorneys that they must not go to circuits (where the judge presides) expecting to succeed in their causes upon errors in the pleadings of adverse parties, unless such errors are fatal to the action or defence.

On the *third trial* of this case, the judge allowed the plaintiffs to amend their complaint without costs, or on any terms, so as to conform it to the facts proved. The plaintiffs' claim for which the action was brought, was for the sum of \$400, alleged to have been advanced and paid to the defendant on a contract made

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with the defendant for the purchase of lumber; and alleging a breach of the contract on the part of the defendant, to sell and deliver the lumber as agreed. The amendment of the complaint was allowed, so that it would show that the alleged payment of \$400, was made towards the lumber *at the time* of making the contract; and also, so it would contain an averment of an excuse for plaintiff's not offering to receive the lumber, and pay the unpaid portion of the price thereof, at the place, &c., at the time, &c.

Chemung Circuit, February, 1858.

THIS action was tried for the third time at the Chemung circuit, held by Justice BALCOM, in February, 1858.

The complaint in the action was as follows:

"The plaintiffs in this action, complaining, aver that about the first day of September, 1851, they entered into an agreement with defendant, whereby defendant, in consideration of plaintiffs' promise, hereinafter mentioned, promised to sell and deliver to plaintiffs at Corning, in the county of Steuben, in the course of the fall of 1851, from ten to fifteen thousand fence ribs or rails, two inches by three inches, and sixteen feet long; and in consideration of such promise, plaintiffs promised to pay defendant for said fence ribs, at the rate of ten dollars per thousand feet, board or inch measure, for the quantity which defendant should deliver in pursuance of said agreement; and *thereafter*, on the 29th day of September aforesaid, plaintiffs advanced and paid to defendant on said agreement for the ribs to be delivered as aforesaid, four hundred dollars, and have at all times been ready to perform said agreement on their part, but defendant has not sold or delivered to plaintiffs any fence ribs, as he agreed to as aforesaid, or in any wise; nor has he repaid plaintiffs the four hundred dollars advanced as aforesaid, or any part thereof, although often requested to do so. And plaintiffs aver that such fence ribs, at the time they were agreed to be delivered as aforesaid, were, and ever since have been worth, at Corning aforesaid, the price agreed to be paid therefor, as aforesaid. Wherefore, plaintiffs demand judgment against defendant for four hundred dollars with interest thereon, from the 29th day of September, 1851, and costs of this action."

The answer consisted of denials of the several allegations

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of the complaint. The plaintiffs obtained a verdict for \$400, and interest thereon, on each of the first two trials; but they were set aside for erroneous rulings of the judges who presided thereon. And one of the grounds on which the second verdict was set aside, was, that the plaintiffs had not shown an offer of complete performance of the agreement on their part, by being ready to receive the lumber, at Corning in the fall of 1851, and pay the unpaid portion of the price agreed to be paid therefor.

On the last trial, at the February circuit, 1858, the plaintiffs appeared by S. G. HATHAWAY, JR., their counsel, and the defendant appeared by SMITH & MURDOCK, his counsel.

BALCOM, Justice. After the plaintiffs' counsel had opened the cause to the jury, and before any evidence was given, the defendant's counsel moved for a nonsuit, on the ground that the complaint did not state facts sufficient to constitute a cause of action, inasmuch as it did not show that the alleged contract for the lumber, was in writing; or that any part of the lumber had been accepted and received by the plaintiffs; or that the plaintiffs paid the \$400 on the contract, *at the time it was made*; but that the complaint expressly showed that the \$400 was paid subsequent to the time of making the contract; and that such subsequent payment did not relate back and make the contract valid. Defendant's counsel cited on this point, 2 R. S. 136, § 3; *Sprague agt. Blake*, (20 Wendell, 61.) The judge remarked that he would hear the plaintiffs' evidence, and if the same should establish a cause of action, the complaint might be amended, if he should come to the conclusion that it was defective, in the particulars specified by the defendant's counsel. He thought sections 169, 173, 174 and 176 of the Code, authorized such a course; and thereupon denied the defendant's motion for a nonsuit; to which ruling the defendant's counsel excepted.

The plaintiffs offered to prove, as an excuse for not offering to receive the fence ribs, and pay the unpaid portion of the purchase price of the same in the fall of 1851; that about the

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20th of October, in that year, the defendant's agent called on the plaintiffs' agent, and informed the latter, that the defendant would not be able to deliver the fence ribs, pursuant to the contract therefor, because they had been attached on process, issued in Pennsylvania, from whence the defendant had designed to ship them by the Blossburgh Railroad, to Corning, N. Y. The defendant's counsel objected to the evidence offered, as immaterial; and on the ground that the complaint contained an averment of performance of the contract by the plaintiffs, and none of any excuse for their non-performance of it. But the judge overruled the objection, and permitted the plaintiffs to give the evidence, (the defendant's counsel excepting to the ruling;) the judge saying he thought justice required him to hear the evidence, and ascertain if the plaintiffs had a legal cause of action, arising on the alleged contract for the lumber; and if they had, the complaint could probably be amended, so as to embrace it. But, without saying precisely what he would do, when the evidence should be all out, he would allow the plaintiffs to make the proof they had offered, and go through with the case on their part. The plaintiffs then gave the evidence they had offered, and also all they had, to establish their right to recover on the contract, and rested their case. The defendant's counsel thereupon asked the court to nonsuit the plaintiffs, on the following grounds, among others, to wit: that the contract as set out in the complaint, was void by statute, for the reasons hereinbefore stated; that no recovery could be had upon the contract; nor could the money, alleged to have been advanced on it, be recovered under the complaint; for the variance between it and the proofs, and the want of necessary averments in it. That the proofs did not show an offer of complete performance of the contract, on the part of the plaintiffs; nor a readiness or ability to perform it, in the fall of 1851. The defendant's counsel strenuously objected to any amendment of the complaint by the plaintiffs; and especially as the action had been twice tried on the complaint, as it then stood; and contended the defendant would be greatly prejudiced, if the

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plaintiffs were permitted to amend the complaint. But the judge allowed the plaintiffs to amend the complaint, without imposing any terms on them whatever, so as it would show that the alleged payment of \$400, was made towards the lumber *at the time* of making the contract; and also, so it would contain an averment of the alleged excuse, for the plaintiffs' not offering to receive the lumber, and pay the unpaid portion of the price thereof, at Corning, in the fall of 1851, (the defendant's counsel excepting to such ruling.) But the judge nonsuited the plaintiffs, on other grounds, which it is not necessary to mention; to which decision the plaintiffs' counsel excepted; and for which ruling they will move for a new trial, at the general term.

This case is now reported, for the sole purpose of exhibiting the views of the judge on the subject of allowing amendments of pleadings on the trial; and so attorneys will not go to circuits, expecting to succeed in their causes, upon errors in the pleadings of adverse parties, unless such errors are fatal to the action or defence.

And on this subject, Justice BALCOM said: he did not intend a plaintiff should ever lose his case, where he presided on the trial, by reason of any mistakes made by his attorney, in setting out the cause of action in the complaint; and that he thought a defendant should never be deprived of a defence, in consequence of any errors of his attorney in preparing the answer. He had never turned a plaintiff out of court, who had a good cause of action, for any error or defect in the complaint, or on the ground that there was a variance between it and the case made by the evidence; nor had he ever excluded a defence, proved or offered to be proved, by reason of any error or defect in the answer, or because the defence proved, varied from that contained in the answer, but had, invariably, allowed the pleadings to be amended on the trial, and conformed them to the cause of action or defence, as the same was found to exist. This course, he said, was enjoined upon the court by the Code. (*See* §§ 169, 170, 173, 174 and 176.)

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He said: the old system of pleadings and practice was abolished, because parties were often beaten at the circuit, in actions, solely for errors committed by their attorneys, in preparing the pleadings; and the Code was substituted in its stead, so that the *real* controversies between parties to actions, should be tried on their merits at the circuit, whether the pleadings were in proper shape or not, respecting the matters in dispute.

He also said, the meaning of the Code, as he understood it, was, that the pleadings in actions should be amended in all cases, at the trial, so as to make them state and embrace, in legal language, the matter in dispute, unless the amendment substantially changed the *claim* or *defence*. (See Code, § 173.) That the plaintiffs' *claim* in this case, was the \$400, aside from interest, which they alleged they paid to the defendant, on the contract for the lumber; and not whether the plaintiffs or defendants had done this or that, under the contract, to entitle them to the \$400, and interest thereon. And he thought the plaintiffs' claim in this action, would not be substantially changed, by conforming the complaint to the facts proved, where the former varied from the proof; and would, therefore, permit the plaintiffs to amend the complaint, so as to conform it to the facts proved.

He said he would also remark further, that he had very seldom found it necessary to impose any terms, on allowing pleadings to be amended; and he never did so where a party came to court *prepared* to be surprised or misled, if the pleadings of his adversary should be amended, by leaving a witness or paper at home for such a purpose. He added that, when parties have a matter in difference they *know* exactly what it is, and should fully and fairly state it to their attorneys, and come to court *prepared to meet the case as it actually existed*, without taking fine sight at the pleadings, to see if justice could not be cheated out of her dues, by some objection based upon them. The sooner parties and their attorneys learn that they must come to the circuit fully prepared to meet the case to be tried, *as it has really occurred*, and not

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to meet it *solely* as some inexperienced lawyer has stated it in the pleadings, the better it will be for them where he (Judge B.) presided; for they would very seldom be able to make a case which would induce him to postpone the trial, or require any costs to be paid, as a condition for allowing a party to amend his pleading.

He also remarked that he had no fears that the liberality with which he allowed parties to amend their *pleadings, on the trial*, would tend to make attorneys more careless than they now are in preparing them; for the reason that the remedies by demurrer and special motion to test and correct pleadings, may be resorted to, prior to the trial, which would always induce attorneys to be accurate in framing the pleadings.

The judge concluded by saying, he had not made all these observations, because they were applicable to the case on trial, but for the reason that he desired attorneys to understand, that they need not come to circuits where he presided, with the illusory hope of succeeding in actions, on errors in the pleadings of their adversaries; but must come prepared to try their cases on the merits, as their clients knew them to be, whether the pleadings fully or correctly presented the matters really in dispute or not; for he should always permit parties (unless a different rule should be established by the general term, or court of appeals) to amend their pleadings, in almost any manner in furtherance of justice; and generally without any postponement of the trial, or imposing any costs on the parties making the amendments.

NOTE. The views expressed in this opinion suggest a reference to the liberal provisions and policy of the Code alluded to by Judge GOULD, in the opinion in the case of *Doedt agt. Wiswall*, (*ante*, page 128,) where he says, (speaking of the allegations of the cause of action in the complaint,) "their lack of clearness and precision is carried to the very limit of what is sometimes said to be the effect, (as well as the intention) of the Code, viz: that parties come into court and tell their own story, and the court is to apply the proper relief."

It is not difficult to imagine a scene of ordinary skirmishing by experienced counsel, on a trial at the circuit, on the application of these liberal principles of pleading and amendment. The plaintiff's counsel proceeds with his evidence, on the trial, in the usual manner, until he has discovered that it bears very

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strongly in a direction not anticipated, and that the facts necessary to be proved to sustain his action are quite different from those alleged in the complaint. Ha, however, calls a witness to prove his new state of facts; upon which, the defendant's counsel very peremptorily objects, as being entirely inapplicable to the case made by the complaint. The plaintiff's counsel thereupon applies to the judge for an amendment of his complaint, so as to embrace the proposed evidence. The judge, on reflection, says, yes, I will allow you to amend; I don't think the amendment will change substantially, the cause of action. But, says the defendant's counsel: your honor, this is an entire new case which the counsel now proposes to establish by this evidence; we have had no notice of it, and if this amendment is to be allowed, I should desire a little time to make preparation to argue the question; it is a complete *surprise* upon us. Well, says the judge, surprise parties are common in these days, and besides, under the liberal policy of pleading and amendment allowed by the Code, we must not be surprised at anything in the way of amendments under it.

The defendant's counsel, with energy exclaims, (and it may be with unbecoming deference,) that if this is the practical application to be given to this liberal system, he should consider the whole system and policy, as containing no true liberality, but afflicted with a most terrible *looseness*, revolting to a mind containing the least particle of regard for the true principles and structure of pleading and practice, so essential to the appropriate government of parties in enforcing and defending their legal and equitable rights. The judge (with a humorous pacification playing on his countenance) remarks, why, my dear sir, you ought not to complain of a system of pleading which shifts the *onus*, and throws it upon the judge at the trial to settle the pleadings in a cause, instead of having them prepared, and properly adapted to the proof in the case, by the counsel, before the trial begins. It may be your turn next to ask similar assistance at the hands of the court.

Thank your honor, says the defendant's counsel, I have no doubt that if placed in such a dilemma, I should be exceedingly well pleased to avail myself of your honor's superior wisdom and skill as a pleader; but in this case, I think the answer is drawn so as to stand fire, unless your honor permits the plaintiff to go off half cocked, once or twice more; in such an event I would not vouch for the ability of your honor, even, to adapt the answer to such a thatched complaint as would necessarily then appear. But if successful in that, I would venture to predict that after a period of six weeks, neither your honor, nor any other good lawyer, (saying nothing of a "common understanding,") on examination of the *judgment roll* on file, would "know what was intended."—[REPORTER

COURT OF APPEALS.

NATHAN COBB agt. GEORGE B. CORNISH.

There are but two cases in which the proceedings upon a trial at the circuit can be reviewed at the general term, in the first instance, before judgment. One is, where the unsuccessful party desires to move for a new trial upon *exceptions* taken by him upon the trial, (if the judge deems them of sufficient importance to be sent to the general term.) If the exceptions are sustained, the general term is authorized to grant a new trial; if not sustained, to render final judgment.

The other case is, where upon the trial, an uncontroverted state of facts is presented involving only questions of law. In that case, the judge may, if he think fit, direct a verdict subject to the opinion of the court at general term. It devolves on the party in whose favor the verdict is rendered, to prepare the case upon which the general term is to render judgment. In such a case, the question for the general term is, not whether a new trial shall be granted, but which party upon a conceded state of facts, shall have final judgment.

Where the plaintiff on the trial took an exception to the ruling of the court upon a question of evidence, and the defendant also took exceptions to the refusal of the court to instruct the jury as to the value of the property in dispute; the jury having rendered a verdict for the plaintiff, the court ordered that the motion for judgment, upon a case to be made, be heard at a general term in the first instance, and the general term rendered final judgment against the plaintiff:

Held, that the case was not in a situation to authorize the judge to send it to the general term for final judgment. The plaintiff was not unsuccessful. The verdict was in his favor. He had no occasion to avail himself of his exception as a ground for a new trial.

The verdict being for the plaintiff, the case could only go to the general term upon the exception of the defendant, and all that the general term could regularly do, was to render judgment upon the verdict, if the exception was not well taken; or if well taken, to grant a new trial.

The cause was not in a condition to authorize the court to direct a verdict subject to the opinion of the court at a general term, for the reason that exceptions had been taken, upon which the parties had a right to be heard upon a motion for a new trial.

March Term, 1858.

By the court—HARRIS, Judge Great irregularities have occurred in the proceedings through which this cause has reached this court. The action was tried at the circuit, and

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by a jury. Upon the trial, evidence was offered by the plaintiff, which being objected to by the counsel for the defendant, was excluded; an exception was taken to the decision. The testimony being closed, the court directed the jury to assess the value of the property in question. The defendant's counsel requested the court to give certain instructions to the jury in relation to the effect of a part of the evidence upon the question of value. This the court refused to do, and the counsel for the defendant excepted. The jury having rendered a verdict for the plaintiff, the court ordered that the motion for judgment, upon a case to be made, be heard at a general term in the first instance, and that judgment be suspended in the meantime.

This order was clearly irregular. The judge at the circuit had no authority to make such an order. There are but two cases in which the proceedings upon a trial at the circuit can be reviewed at the general term in the first instance, before judgment. One is, where the unsuccessful party desires to move for a new trial upon exceptions taken by him upon the trial. In that case, the judge trying the cause may, if he deem the questions presented by the exceptions of sufficient importance, direct that the motion for a new trial upon the exceptions be heard in the first instance at a general term, and that judgment be suspended until such hearing. If the exceptions are sustained, the general term is authorized to grant a new trial, if not sustained, to render final judgment.

The other case is, where upon the trial, an uncontroverted state of facts is presented involving only questions of law. In that case, the judge may, if he think fit, direct a verdict subject to the opinion of the court at the general term. In form, the verdict is rendered in favor of one party or the other, and it is quite immaterial which. The only effect of rendering the verdict in favor of a party is, that it devolves on him to prepare the case upon which the general term is to render judgment.

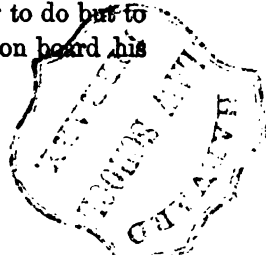
The case before us was not in a situation to authorize the judge at the circuit, to send it to the general term for final judgment. The plaintiff had taken an exception to the ruling

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of the court upon a question of evidence. If unsuccessful upon the trial, he had a right to have that question considered, upon an application for a new trial. But he was not unsuccessful. The verdict was in his favor. He had, therefore, no occasion to avail himself of his exception as a ground for a new trial. And yet the general term has rendered final judgment against him. This it was not authorized to do. The verdict being for the plaintiff, the case could only go to the general term upon the exception of the defendant, and all that the general term could regularly do, was to render judgment upon the verdict if the exception was not well taken; or if well taken, taken, to grant a new trial.

The case was not in a predicament to authorize the court to direct a verdict subject to the opinion of the court at a general term, for the reason that exceptions had been taken upon which the parties had a right to be heard upon a motion for a new trial; and upon a verdict subject to the opinion of the court, the question is never whether a new trial shall be granted, but which party, upon a conceded state of facts, shall have final judgment.

But if these irregularities are to be disregarded, I have no difficulty in affirming the judgment. The defendant is chargeable with no breach of obligation or duty. He was the master of a vessel bound from New-York to San Francisco. The plaintiff, upon an adventure, shipped on board his vessel three cases of boring machines. They were consigned to Charles E. Hunter. Upon arriving at San Francisco, the defendant received a letter from the plaintiff, informing him that one Dall, a carpenter, had taken one of the machines over the Isthmus to exhibit, and directing him, if Dall could do anything with the machines by way of sale, to deliver them to him, he paying the freight thereof, and if Dall should be unable to sell them, to keep the cases on board the vessel. Neither Hunter, the consignee, nor Dall, to whom the plaintiff had directed the defendant to deliver the machines, would receive them. Under these circumstances, the defendant had nothing to do but to obey the plaintiff's instructions, and keep them on board his



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vessel. This he did. The vessel remained at San Francisco several months, and receiving no further directions in relation to the machines, they were brought back to New-York upon the return of the vessel. The defendant might, perhaps, have been justified, even without instructions, in storing the machines at San Francisco when he left, but he certainly was under no legal obligation to do so. Upon the merits, therefore, the judgment should be affirmed.

But a majority of the court are of opinion that the irregularities, before noticed, are too serious to be overlooked. They, in fact, amount to a *mistrial*. Upon this ground, the judgment must be reversed and a new trial granted, with costs to abide the event.

SUPREME COURT.

PUDNEY & RUSSELL agt. GRIFFITHS & BATES.

No proceedings supplementary to execution can be sustained, where the legal remedy by execution has not been fully and really exhausted. It must not be a sham attempt to do so, but the proper officer must be allowed to take the usual course to effectuate the object which the process was designed to serve. Therefore, where an execution was issued upon the judgment and the plaintiffs directed the sheriff to return it within the sixty days, and instructed him not to proceed to serve it; *Held*, that an order on supplementary proceedings should be set aside with costs.

MOTION to set aside an order for proceedings supplementary to execution.

ANDERSON & WYATT, *for motion*.

COOPER & RICE, *opposed*.

CLERKE, Justice. It is asserted, and for the purpose of this motion admitted, that the plaintiffs directed the sheriff to re-

turn the execution issued in this action, before the expiration of the sixty days, and instructed the sheriff not to proceed to serve the execution.

Now supplementary proceedings under the first part of section 292 of the Code, were evidently designed as a remedy, not concurrent or simultaneous with an execution, but as the adjective designating these proceedings imports, to supply its place, where it has failed to be effectual. And in all cases, the execution must precede the resort to the supplementary remedy; it must be issued with a *bona fide* attempt to find and attach any property which it can reach. Otherwise, the intention of the law requiring the issuing of the execution would be an idle ceremony. If this were not so, it would save much trouble; it would in every respect be more convenient and proper to allow the commencement of what we now call supplementary proceedings, immediately on the rendition of the judgment, and without the intervention of an execution. We all know that the creditor's bill, for which these proceedings are a substitute to a certain extent, could not have been filed until what was called the legal remedy should be exhausted.

There is nothing under the present system superseding this requirement. The remedy by execution must still be exhausted; it must be really exhausted—it must not be a sham attempt to do so; but the proper officer must be allowed to take the usual course to effectuate the object which the process was designed to serve.

This certainly is not done when the plaintiffs in an action interpose and prevent the sheriff from even searching for property, by prematurely directing him to return the execution and not to serve it, for the express purpose of enabling them to commence these proceedings.

The order must be set aside with \$5 costs.

The President, &c., of the Bank of Genesee agt. Spencer.

SUPREME COURT.

THE PRESIDENT, DIRECTORS AND COMPANY OF THE BANK
OF GENESEE, Appellants agt. BURRALL SPENCER, Re-
spondent.

The proceeding supplementary to execution provided by the Code, is a proceeding in the action.

A county judge before whom such a proceeding is pending undetermined, has no power to make an order staying the proceedings therein.

Erie General Term, September, 1856,

Present BOWEN, P. J., GREENE and MARVIN, Justices.

APPEAL from an order of the county judge of Erie county, staying proceedings on an order of reference to examine the defendant in proceedings supplementary to execution, pending before the county judge.

The defendant's affidavit upon which the order in question was founded, sets forth that on affidavits showing the recovery of judgment in this action on the 28th day of September, 1846, that an execution was issued on said judgment to the sheriff of Erie county, in the month of July, 1854; that said execution was issued without leave of the court, or the consent of the defendant, and that no execution had been issued on said judgment within six years next before the issuing of the one above mentioned, a motion was made at a special term of the supreme court on the 12th day of October, 1855, to set aside said execution, and all proceedings subsequent thereto; that such motion was denied; that the defendant appealed from the order denying the motion, to the general term of this court, and that the order was, upon such appeal, affirmed; that the defendant has appealed from the order of affirmance to the court of appeals, and filed security to stay proceedings, &c. On this affidavit, the county judge made an order that the plaintiff show cause before him, on a certain

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day, why all proceedings in execution of said order of reference should not be stayed until the determination of said appeal. The plaintiff appeared on the return day of the order to show cause, and objected that the county judge had no power or jurisdiction to make an order staying the plaintiff's proceedings in the premises. The plaintiff also read an affidavit, showing that an order of reference was made in the action in proceedings supplementary to execution in February, 1855; that the defendant appealed from that order to the general term of this court, where the order was affirmed at the September term of that year; that the defendant appealed from the order of affirmance to the court of appeals, and that such appeal had been determined in favor of the plaintiff, and the remittitur had been duly filed, &c.; that several special terms had intervened after the defendant had personal knowledge, in February, 1855, of the issuing of the execution on which the supplementary proceedings were founded; at which terms the motion to set aside such execution might have been made; that the defendant has never appeared in person before the referee; that the proceedings have been adjourned from time to time in consequence of the defendant's appeal, and delayed by means of orders staying proceedings; that nine adjournments had been procured by the defendant, and the plaintiff has been compelled to attend on said adjournments; that no security to pay the debt has been given by the defendant, but merely an undertaking to pay the costs of the appeal, and the amount directed to be paid by the order appealed from.

The county judge made an order staying all proceedings on the order of reference, until the determination of the appeal to the court of appeals, from the order denying the motion to set aside the execution. The plaintiff appeals from the order of the county judge, to this court.

JOSHUA L. BROWN, for appellant.

WM. H. GREENE, for respondents.

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By the court.—GREENE, Justice. I think the county judge had no power to grant the order appealed from. If the power exists, it must be found either in the provisions of the Code, or the judiciary act, by which his powers to grant orders in actions pending in this court, are conferred and defined; or in those provisions of the Code which give him jurisdiction to entertain proceedings supplementary to execution in such actions. By § 401 of the Code, it is provided that orders made out of court without notice, may be made by any judge of the court, in any part of the state; and they may also be made by a county judge of the county where the action is triable, *except to stay proceedings after verdict*. Section 403 provides that in an action in the supreme court, a county judge, in addition to the powers conferred upon him by this act, may exercise within his county, the powers of a judge of the supreme court at chambers, according to the existing practice *except as otherwise provided in this act*. By section 27 of chapter 470, of the laws of 1847, it is provided that every county judge within the county in which he shall have been elected, shall have power to perform all such duties as by the laws in force on the 12th day of May, 1847, might have been performed by the judges of the court of common pleas, or any one or more of them, at chambers or otherwise, when not holding court, or by any such judge being of the degree of counsellor of the supreme court, and acting as a supreme court commissioner. By the 20th section of the article of the Revised Statutes, defining the powers of supreme court commissioners, (2 R. S. p. 280,) it is provided that no supreme court commissioner shall be authorized to grant any order to stay proceedings in any cause in which a verdict shall have been rendered.

If this proceeding supplementary to the execution is a proceeding in the action, clearly the county judge has no power to stay the proceedings in any stage of it, or for any cause. In the enumeration of his powers in actions in this court, this power is expressly excepted by section 401 of the Code, and by the section of the judiciary act already cited, when read in connection with the provisions of the Revised Statutes defin-

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ing the powers of supreme court commissioners, which are by the judiciary act conferred on county judges. It is contended by the defendant that this exception in section 401, means that a county judge shall not stay the entry of judgment or the issuing of an execution thereon. But I take it, the statute means what it says. I find no qualification of this express provision, and we have no power to make one. But if we had, there is nothing in the character of this proceeding to justify the qualification now contended for. The ordinary execution is issued to enforce the judgment, by procuring satisfaction out of the visible property of the debtor. It is conceded that a county judge has no power to stay the issuing of that process. If the debtor eludes it by concealing his property, or changing its nature so that it cannot be reached by that process, the law gives the creditor this process or proceeding, for the purpose of enabling him to search closer, and reach farther for the debtor's property, than the sheriff can with a common law execution. It is a cumulative remedy, a species of equitable execution which the law gives the creditor for the purpose of enabling him to procure satisfaction of his judgment. What reason, then, is there, why a county judge should be prohibited from staying a common execution which is not applicable to this proceeding? But it is unnecessary to search for reasons, when we have the plain authority of the statute. I have no doubt that this is a proceeding in the action, as much as the issuing of an execution, or a motion for leave to issue one, after the lapse of five years. It is said that it is a distinct, independent proceeding, and that it can be instituted only upon proof of new facts. The same is true of an execution issued after the lapse of five years from the rendition of judgment.

But if it is not a proceeding in the action, it is a special proceeding given and governed solely by chapter 2, of title 9, of the Code, which is entitled "of proceedings supplementary to the execution," and the power of the county judge to stay the proceedings, if it exists, must be found there. I find no such power in that chapter, and it is not claimed by the de-

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pendant that it contains any provision which confers the power upon the county judge. Upon certain proof he is required to make an order for the debtor to appear and answer, he is authorized to take the examination or appoint a referee for that purpose, to enforce obedience to his orders by summary process as for contempts, to make an order appointing a receiver, and restraining the debtor from disposing of his property, and in case the examination shall disclose any property in the debtor's possession, the judge may make an order for its application to the payment of the judgment. In short, all the provisions of this chapter look to one object, and that is a speedy consummation of the proceeding. To that end, the judge is directed to *proceed*, but he is nowhere authorized to *stop*. He has no discretion in the matter. To the suggestion that he has independent and original jurisdiction in this proceeding, and acts as a court of equity; it is a sufficient answer that he acts in all things as an *officer* of the court, and not as a court, so far as judgments in this court are concerned. He derives all his powers, as such officer, from this chapter, and he can do nothing for which he cannot find the authority there. If there is any power to interfere with the progress of these proceedings in actions in this court, it is vested in the court or its judges, and not in county judges before whom such proceedings may be pending. I think the order should be reversed.

Order reversed.

NOTE.—After the decision in this case, which is reported, *ante* p. 14, was made, the county judge of Erie county, on the application of the defendant, made a second order staying the proceedings. The plaintiff appealed therefrom, and on argument at the Erie general term, held in November, 1857, before DAVIS, P. J., GREENE and MARVIN, Justices, the order was reversed. It was claimed on the part of the defendant, that the order should be sustained on the authority of the opinion reported at page 14. But the court adhered to the preceding opinion, and held that the decision in the 7th district was not in conflict with this; and that it was not open to the construction claimed for it on the part of the defendant. There is an error in the statement at page 14, *ante*, that the proceeding was before the county judge of Genesee. It should read "Erie" instead of "Genesee."

SUPREME COURT.

ROBERT TAYLOR agt. DUDLEY PERSSE and others.—Two actions.

It seems, that by the scope and operation of the 468th section of the Code, the former judgment creditor's suit under the Revised Statutes, "to compel the discovery of any property or thing in action belonging to the defendants," is repealed or superseded; and that § 292 providing for proceedings supplementary to execution, is substituted therefor.

But this does not reach an action brought by a judgment creditor to set aside an assignment made by his judgment debtor, as fraudulent and void, as against creditors. Such an action is entirely different in its object from that primarily sought by the institution of supplementary proceedings, or by a mere creditor's bill.

Where the plaintiff had as a judgment creditor, commenced proceedings supplementary to execution, against the defendants; and subsequently commenced an action against the same defendants to set aside an assignment made by one of the defendants to another defendant, as fraudulent and void;

Held, on motion to compel the plaintiff to elect between the two proceedings, and to proceed in one only, that the motion must be denied. Being doubtful whether under any circumstances this would be the proper course, to compel a plaintiff to elect between a valid and invalid proceeding.

At Chambers, April 8, 1858.

MOTION by defendants to compel the plaintiff to elect between two proceedings, and to proceed in one only.

FIELD & SLUYTER, *for motion.*

J. W. GILBERT, *opposed.*

CLERKE, Justice. In one of these actions, the plaintiff recovered judgment against the defendants; and after the return of an execution unsatisfied, issued upon the judgment, he commenced supplementary proceedings about the 2d of December, 1857, pursuant to section 292 of the Code. On the 11th of March, 1858, he commenced an action in the nature of a creditor's bill, to set aside an assignment made by the defendants Persse, Brooks and Megie, to the defendant Forrest. This is a motion to compel the plaintiff to elect between these two proceedings, and to proceed in one only.

Taylor agt. Persse and others.

The action allowed by statute before the Code, (2 R. S. 173, § 41, *marginal paging*), to a judgment creditor, after the return of an execution unsatisfied, "to compel the discovery of any property or thing in action belonging to the defendant;" and "to prevent the transfer of any such property, money or thing in action," &c., was a remedy in all respects substantially the same in its scope and object, as that subsequently provided by the Code, (§ 292,) and now amply available. The latter is much more simple, direct and effectual in its mode of operation; and although it does not in direct terms repeal or supersede the other, I think the existence of the former is so manifestly unnecessary, that it may be reasonably deemed inconsistent with the new and better remedy. It may, therefore, be considered within the scope of section 468 of the Code; which repeals all statutory provisions inconsistent with the provisions of the Code. This was, evidently, the view taken by the superior court, in *Quick agt. Keeler*, (2 Sand. S. C. R. 281,) and in *Dunham agt. Nicholson*, (2 id. 636.) The question presented in these cases was, whether a judgment creditor was at liberty to proceed by a complaint in the nature of a creditor's bill, where his execution was returned unsatisfied before the Code? The court decided that the complaint could be maintained, but purely on the ground that the subsequent act declaring the application of the Code, did not apply its provisions relative to proceedings after execution, to suits then existing, except where the execution had been issued after the Code took effect. If the execution had been issued after the Code took effect, it is to be inferred, necessarily, *that as the new remedy provided by the Code, would reach the case*, they would have decided that the plaintiffs could not have proceeded by a complaint in the nature of a creditor's bill.

But if I am to rely on the plaintiff's affidavit, the second action is not commenced for the purpose of "compelling the discovery of property belonging to the defendant," and "to prevent the transfer of it or the payment or delivery thereof," but to set aside, as fraudulent and void, an assignment made by the defendants Persse, Brooks and Megie, to the defendant

Forrest, conveying their partnership property only, and not embracing their individual property.

This is an object entirely different from that primarily sought by the institution of supplementary proceedings, or by a mere creditor's bill. And as I am not to suppose, that the plaintiff intends to include anything more in his complaint, which is not yet filed, I must deny this motion.

Besides, I doubt whether under any circumstances this would be the proper course. I could not compel a plaintiff to elect between a valid and invalid proceeding.

It is another question, indeed, when supplementary proceedings have been once commenced, whether the plaintiff can sue in his own name to set aside, as fraudulent, a conveyance of property previously made by the defendants.

Section 299 of the Code, says: "If it appears that a person alleged to have property of the judgment debtor, &c., claims an interest in the property adverse to him, such interest shall be recoverable only in an action against such person *by the receiver*." Justice HARRIS in *Goodyear agt. Betts*, (7 How. 188,) considers the language of the provisions broad enough to bear the construction to which I have referred; but he thought it was intended that it should be confined in its operation to cases, where proceedings supplementary to execution, as in the present case, had already been instituted. He thought the judgment creditor himself could sue where no supplementary proceedings had been commenced. The general term, however, in the fourth judicial district, in *Hayner agt. Fowler*, (16 Barb. 300,) and in *Seymour agt. Wilson*, (*ib.* 294,) decided that a receiver appointed under supplementary proceedings could not bring a suit to set aside conveyances executed by the judgment debtor prior to the appointment of the receiver, and that it must be done in all cases by the judgment creditor himself.[1] This is an interesting question, and one that must very fre-

[1] The doctrine of these cases referred to in *Barbour*, has been overruled by the court of appeals, in *Porter agt. Clark*, (12 How. 107,) and in *Seymour agt. Wilson*, (*ante* p. 355.) The latter decision is made in the same case reported in 16 Barb. 294.—[REFOURNA.]

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quently arise in this district; but, as the question is not properly before me on the present motion, or, rather as it is not necessary for me to decide it on this occasion, I dismiss this application on the ground above intimated.

Motion denied with \$10 costs.

SUPREME COURT.

WILLIAM B. BURNETT agt. GEORGE D. WESTFALL.

The plaintiff brought his action upon a promissory note, made by the defendant for \$449.70, and transferred by the payee to the plaintiff, who claimed judgment for the full amount. The defendant put in his answer, setting up, among other things, two counter claims and set-offs of two notes, made by the payee to the defendant, one for \$125, and the other for \$200.

At the time of the service of the answer, the defendant's attorney served upon the plaintiff's attorney, an *offer* in writing, as follows: (Title of the cause.) "Sir, take notice that the defendant hereby offers to allow the plaintiff in this action, to take judgment against him, for the amount claimed in the summons and complaint, less the amount of the two notes of Joseph Westfall, set up in the third and fourth defences in the answer, and for costs and disbursements."

Held, that this offer was sufficient. It was not necessary that it should have been made for a *specific sum*. The balance for which the plaintiff would have been entitled to enter judgment, could have been easily ascertained by the clerk, upon a computation of interest accrued on the respective notes. In most cases where a precise sum is named in the offer, it would be necessary before entering judgment, to have a computation of interest thereon by the clerk.

And it is no valid objection to such an offer, that the answer is not filed, so that the clerk can legally see the amount of the set-off, or notes to be deducted. Because, 1st, the answer in this case referred to the offer, and was served with it, and should be filed with the offer as a part of it. And 2d, the Code provides that in all cases other than when the complaint is not answered, the judgment roll shall consist of the summons, pleadings or copies thereof, and a copy of the judgment, with any verdict or report, the offer of the defendant, exceptions, case, and all orders and papers in any way involving the merits and necessarily affecting the judgment. The answer is to constitute a part of the judgment roll.

The plaintiff having failed at the circuit, to obtain a more favorable judgment than the defendant offered, the defendant was allowed costs from the time of the offer, and to have the same set-off against the plaintiff's recovery.

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The *motives* of a plaintiff in purchasing a note for prosecution, is not a proper subject for an *extra allowance* of costs. After he has got the note, he may conduct the prosecution of it fairly and without objection.

Ontario Special Term, April, 1857.

MOTION by defendant for costs against plaintiff, and for an extra allowance, &c., and that defendant's costs be set off against the recovery by plaintiff.

The action was upon a promissory note made by the defendant to Joseph Westfall or bearer, dated November 26, 1852, for \$449.70, payable one day after date, with a payment indorsed at date of the note of \$18.67.

The summons and complaint were served September 16, 1856, and claimed judgment for the amount of the note, deducting the amount of the payment indorsed, with interest on the balance from the time the note became due.

On the 22d September, 1856, the defendant's answer was served, setting up among other things, two counter claims, and set-offs of notes made by Joseph Westfall, the payee of the note upon which the action was brought, one for \$125, dated July 31, 1854, payable Oct. 1, 1854, with use; and the other for \$200, dated January 3d, 1855, payable one day after date. These counter claims were the third and fourth defences contained in the answer. At the same time with the service of the answer, the defendant's attorney served upon the plaintiff's attorney an offer in writing, which, after the title of the cause, was in the words and figures following: "Sir, take notice that the defendant hereby offers to allow the plaintiff in this action to take judgment against him for the amount claimed in the summons and complaint, less the amount of the two notes of Joseph Westfall, set up in the third and fourth defences in the answer, and for costs and disbursements.

Yours, &c.,

CORNWELL, WELLING & ARNOLD,
Defendant's Attorneys."

"To S. BALDWIN, Esq.,
Plaintiff's Attorney.

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The plaintiff disregarded this offer, and put in a reply to the two counter claims, taking issue thereon respectively. The action was tried at the Ontario circuit, in February, 1857, when the plaintiff recovered a verdict against the defendant for \$181.75, being the balance of the note sued on, after deducting the set-off and counter claims aforesaid. The defendant asks for judgment for his costs accrued after the offer was served, and for an extra allowance, and that such judgment for costs be set off against the plaintiff's recovery. The moving affidavits contain various statements from which the defendant claims that the prosecution has been unreasonably and unfairly conducted.

T. E. CORNWELL, *for defendant.*

J. C. SMITH, *for the plaintiff.*

WELLES, Justice. The plaintiff's counsel contends that the defendant's offer was insufficient, on the ground that it did not allow the plaintiff to take judgment for a specific amount. Section 385 of the Code provides as follows: "The defendant may, at any time before the trial or verdict, serve upon the plaintiff an offer in writing to allow judgment to be taken against him for the sum or property, or to the effect therein specified, with costs. If the plaintiff accept the offer, and give notice thereof in writing within ten days, he may file the summons, complaint and offer, with an affidavit of notice of acceptance, and the clerk must thereupon enter judgment accordingly." "If the plaintiff fail to obtain a more favorable judgment he cannot recover costs, but must pay the defendant's costs from the time of the offer." The clerk, upon the plaintiff's filing the summons, complaint, offer and affidavit of notice of acceptance, must thereupon enter judgment *accordingly*: that is, according to the defendant's offer.

In the present case, that offer was, in substance, to allow the plaintiff to take judgment for the amount claimed in the complaint, after deducting the amount of the two notes against

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Joseph Westfall set out in the answer. The balance for which the plaintiff would have been entitled to enter judgment, could have been easily ascertained by the clerk upon a computation of interest accrued on the respective notes.

But the plaintiff insists that the offer should specify the particular sum for which the judgment is to be entered, and leave nothing for the clerk to do in ascertaining the amount. It is argued that the language of the section referred to, requires this construction. The offer is to be, that the plaintiff take judgment for the sum or property, and it is insisted that this means, in an action for money, a specific sum. And again, it is argued that in this case, the clerk could not determine from the papers which the section requires the plaintiff to file when he applies to have judgment entered, which are the summons, complaint, offer and affidavit of notice of acceptance, for what sum the plaintiff is entitled to have the judgment entered; as none of those papers contain a statement of the notes described in the answer which were to be allowed to the defendant. In regard to the objection growing out of the words employed in the statute, it seems to me it will not do to adopt the construction for which the plaintiff contends. If that construction is to prevail, an offer to allow the plaintiff to take judgment for the amount claimed in the complaint, which set forth an indebtedness in a sum certain at the commencement of the action, and demanded judgment for that sum with interest, would be insufficient, because a computation would be necessary to determine the amount due when the judgment was entered. And even when the offer is for a sum certain, say one hundred dollars, unless the plaintiff accept it, and enter his judgment on the day the offer is served, a computation of the interest accruing between the service of the offer and the entry of judgment would be necessary in order to do justice to the plaintiff. In most cases, upon receiving such an offer, the plaintiff's attorney would need some time to communicate with his client before deciding whether to accept the offer, and the Code allows him days for that purpose. If then, the judgment may be entered for

an amount beyond the precise sum stated in the offer, it is not perceived why it may not be done in all cases where the clerk can ascertain from papers legitimately before him, the amount due, and for which the offer authorizes judgment to be entered.

In regard to the argument that the plaintiff is to file only the summons and complaint, with the offer and affidavit of acceptance, and that these would not enable the clerk to compute the amount for which judgment is authorized, the answer is, that in this case the answer and offer were served together, and the offer referring to the notes set forth in the answer, the latter may be regarded as part and parcel of the offer, and no objection is perceived to the plaintiff's filing both as constituting the offer.

Besides, when the plaintiff makes up his judgment roll, or when the clerk does it for him, the answer is to constitute a part of it. Section 281 of the Code, provides that in all cases other than where the complaint is not answered, the judgment roll shall consist of the summons, pleadings or copies thereof, and a copy of the judgment, with any verdict or report, the offer of the defendant, exceptions, case, and all orders and papers in any way involving the merits, and necessarily affecting the judgment. In the present case, the judgment roll should contain the summons, all the pleadings, the defendant's offer with the verdict and judgment.

Upon the whole, I am disposed to sustain the offer in this case, as being sufficient within the spirit and meaning of the Code. That being so, and the plaintiff having failed to obtain a more favorable judgment than the defendant offered to allow him to take, the defendant is entitled to recover his costs from the time of the offer, and to have the same set off against the plaintiff's recovery. That part of the motion which asks for an extra allowance of costs, is denied, for the reason that the facts shown by the defendant, do not tend to establish that the prosecution has been unreasonably or unfairly conducted.

The evidence goes to the question of the plaintiff's motives,

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in purchasing the note on which the action is brought, and in commencing the action upon it, which are immaterial on this question.

There is nothing which tends to impeach the plaintiff in regard to the manner of conducting the prosecution after it was commenced. Besides, the right to ask for an extra allowance in a case of this kind, has been taken away since the argument by the recent amendments to the Code.[1]

The defendant is entitled to an order that he recover his costs accrued in the action since the offer was served, to be adjusted by the clerk of Ontario county, and that the same when so adjusted, be set off against so much of the recovery of the plaintiff in the action.

No costs of this motion allowed to either party as against the other.[2]

[1] This case was not decided until August, 1857.

[2] The above decision was affirmed on appeal, at the Monroe general term, in December, 1857.

COURT OF APPEALS.

DANIEL C. OTIS and others agt. GEORGE C. SPENCER and others.

It is one thing to hold that a judgment can be appealed from, and quite another to decide that the supposed errors occurring at the trial, can be reviewed.

The mode of review where it is sought to reverse a judgment for errors at the trial, is particularly pointed out in the Code. In *Hunt agt. Bloomer*, (3 Kern. 341, and 12 How. 567,) and in *Johnson agt. Whillock*, (id. 344 and 571,) the subject was carefully considered by this court, and the opinions delivered in those cases, were approved by all the judges.

It was held in those cases, whether a trial by the court or a referee, that a review could be had only upon a *case* made, which should contain the conclusions of fact and of law, with a proper statement of the questions presented, and the exceptions taken to the rulings upon the points of law. These facts and conclusions must be *stated in the case*, and the court cannot look for them elsewhere.

Otis and others agt. Spencer and others.

In this case, the appeal book contained nothing but the pleadings, the report of a referee, the judgment and notice of appeal. *Held*, that the court could not look into the report for the reasons and grounds of the judgment, nor to find errors, even if there were any at the trial. The papers were defective for want of such a case as the Code imperatively requires.

March Term, 1858.

N. HILL, JR., *for plaintiffs.*

F. KERNAN, *for defendants.*

COMSTOCK, Judge. This cause was tried by a referee, and judgment was entered on his report in favor of the plaintiffs for \$454.07 and costs. The defendant without making a case appealed to the supreme court at general term, where the judgment was affirmed. He then appealed to this court. The judgment in its nature is appealable, because it is a determination embraced within the definition of the 11th section of the Code of Procedure, and section 383 declares that an appeal may be taken to the court of appeals in the cases mentioned in section eleven. But it is one thing to hold that a judgment can be appealed from, and quite another to decide that the supposed errors occurring at the trial can be reviewed. The mode of review where it is sought to reverse a judgment for errors at the trial, is particularly pointed out in the Code. In *Hunt agt. Bloomer*, (3 *Kernan*, 341, and 12 *How.* 567,) and in *Johnson agt. Whitlock*, (*id.* 344 and 571,) the subject was carefully considered by this court, and the opinions delivered in those cases were approved by all the judges. In one of the cases the trial had been by the court, and in the other by a referee, and we held that in either mode of trial a review could be had only upon a case made which should contain the conclusions of fact and of law, with a proper statement of the questions presented, and the exceptions taken to the rulings upon the points of law. The language of the Code is indeed so plain that it may well occasion surprise that there should be any doubt as to the proper practice. Section 268, in reference to trial by the court, declares that the party desiring to appeal,

may prepare a case or exceptions, in settling which, the judge must specify the facts found by him and his conclusions of law, *and that the questions whether of fact or of law, can only be reviewed in the manner prescribed by that section.* Section 272, which relates to trial before referees, declares that trial by referees is to be conducted in the same manner as trial by the court; that they must state the facts found, and the conclusions of law separately, and their decision must be given in like manner, and may be excepted to and *reviewed in like manner, but not otherwise, and they may in like manner settle a case on exceptions.* If language which is extremely plain, can mean anything, a trial, whether by the court or by referees, cannot be reviewed, unless the party desiring to appeal, prepare a document which the Code denominates a case or exceptions, and has it settled with a proper finding of the facts and conclusions of law. These facts and conclusions must be stated in the case, and we cannot look for them elsewhere.

The decision of the judge or report of the referee, which goes into the record, is merely the authority for entering the judgment, and therefore it merely states, in general terms, what the judgment is to be. All beyond that is mere supererogation. The party wishing to appeal, I repeat, must prepare his case with such a finding upon the facts and the law as he chooses to insert. The other party has a right to propose amendments, and the whole is finally settled by the judge or referee. The practice is extremely simple, although infinite pains appear to have been taken on the part of many to make it difficult and incomprehensible.

In the present case, the appeal book contains nothing but the pleadings, the report of a referee, the judgment and notice of appeal. We cannot look into the report for the reasons and grounds of the judgment, nor to find errors even if there were any at the trial. The papers are defective for want of such a case as the Code imperatively requires. The judgment, as I have said, is appealable, because it is the final determination of the supreme court at a general term, but we can only look into those parts of the record before us which have no

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relation to the trial. Those parts of the record disclose no error, and we therefore affirm the judgment.

All the judges concurred in the foregoing opinion, except STRONG, Judge, who dissented. PRATT, Judge, read an opinion for affirmance on the further ground that the report of the referee disclosed no error at the time. Judgment affirmed.

SUPREME COURT.

STEPHEN V. APPLEBY agt. THE MAYOR, &c. of New-York,
and TERRENCE FARLEY.

It is obligatory upon the common council of the city of New-York, to award and make a contract for the grading of a street to the *lowest bidder*.

A contract made by the corporation contrary to law, is not binding, and cannot be enforced.

A tax payer has a clear right to invoke the aid of this court, to restrain the execution of a contract entered into by the common council in violation of law.

New - York, Special Term, March, 1858.

MOTION for judgment of perpetual injunction.

H. C. VAN VORST, *for plaintiff*.

A. L. WILLARD, *for defendant Farley*.

DAVIES, Justice. The complaint was filed in this cause by the plaintiff as a tax payer and corporator of this city, as well on his own behalf as of all others similarly situated, to restrain the defendant the mayor, &c., from paying any money to the defendant Farley, on a contract made with the street commissioner, for regulating and grading 58th street, between 8th and 9th avenues. It also prays that the defendant Farley may be restrained from any further proceedings under said contract.

The common council by ordinance passed Dec. 27, 1856, directed that 58th street, between 8th and 9th avenues, be regulated and graded. By the ordinances of the city, it then

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became the duty of the commissioner to issue proposals inviting bids to have the work done by contract. In such proposals it was estimated that there would be of earth excavation to complete said work, 3,501 cubic yards, and rock excavation, 12,388 cubic yards.

Bids were received as follows:—

	EARTH per cubic yd.	ROCK per cubic yd.	
Terrence Farley,	\$1.85	00	\$6,476.85

and from various other persons. On the assumption made by the street commissioner, that there were 3,501 cubic yards of earth to be excavated, and that this was to be done for \$1.85 a cubic yard, and that 12,388 cubic yards of rock were to be excavated, and this was to be done for nothing, Farley was the lowest bidder. On this assumption the street commissioner reported the bids to the common council, and the contract was awarded to Farley, and a contract was entered into between him and the street commissioner, dated May 5, 1857, by which he agreed to do the work on the terms mentioned in his bid, to wit: for every cubic yard of earth excavated, he was to receive \$1.85, and for every cubic yard of rock excavation, nothing. If the correct amount of excavation of earth and rock had been taken as the basis of the contract, and which is now ascertained to have been as follows:

Earth excavation,	6,345 cubic yards
Rock	7,140 “

the bids would have been as follows:—

	EARTH per cubic yd.	ROCK per cubic yd.	
Farley . . .	\$1.85	00	\$12,848.25
Taylor . . .	. 85	84	8,344.85
M'Grath . . .	. 20	95	8,077.00
Masterton . .	1.00	25	8,705.00
Ellis	. 15	90	7,377.75
Conolly . . .	. 61½	62½	8,658.81
Hodgins . . .	. 62	64	8,811.50

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From this it is manifest that the bid of Farley to do the work is the highest bid made; that he will receive \$4,000 more for the work than any other bidder, and more than \$5,000 over and above what Ellis offered to do the same work for.

It is clear, therefore, beyond all contradiction, that the contract was awarded and given, and made with, not the lowest bidder, but the highest.

The provisions of the charter and ordinances in force at this time, were such as to make it obligatory upon the street commissioner and the common council to award, and to make the contracts with the lowest bidder. (*Section 12 of the charter of 1853, Dav. Laws, p. 212, § 501, of Ordinances of 1849, as amended.*)

It is well settled that no contract can be made which will bind the corporation, which is made contrary to law. (See *McSpedon agt. Stout, 4 Abbott, 23, and cases there cited.*)

It follows, therefore, that this contract, having been made in direct violation of law, cannot be enforced, and under the decisions made in this district, the plaintiff, as a tax payer, has a clear right to invoke the aid of this court to restrain its execution, or the payment of any money out of the city treasury on account thereof.

A judgment will be entered declaring the contract illegal and void, and that a perpetual injunction be granted, as prayed for in the complaint.

SUPREME COURT.

WILLIAM B. BURNETT agt. GEORGE D. WESTFALL.

Under section 385 of the Code, where the plaintiff fails to obtain a more favorable judgment than the offer made by the defendant, he is not entitled to any

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costs whether disbursements or otherwise, *after* the offer made by the defendant; but the plaintiff is entitled to costs *up to the time the offer was made*.

The defendant charged in his bill of costs, "for proceedings subsequent to offer, and before notice of trial, \$10." *Held*, that this item should be disallowed; no proceedings could be, or werstaken by the defendant after the offer, and before notice of trial.

The defendant also charged "subsequent proceedings before trial, \$10." *Held*, that this item should be reduced to \$7. The cause was tried, and verdict rendered in February, before the amendment of the Code in April following. The right of each party to costs was fixed on the coming in of the verdict.

The defendant charged "trial fee, \$20." *Held*, that this item should be reduced to \$12, on the same principle as the last-mentioned item. The charge of thirty-seven and a half cents was deducted from the charge for affidavits, on the ground that they were made for a motion in the cause, where no costs were allowed.

The defendant charged "clerks' fees, entry and copy judgment, \$1.65." *Held* that this charge should be disallowed, on the ground that the item was chargeable by the clerk to the plaintiff, and not to the defendant.

The defendant also charged, "paid fees of Hiram Peck, constable of Canandaigua, for travel and serving subpoena on Elbridge Farwell of Holley, \$5.42." *Held*, that this item should be disallowed. There was no law for allowing anything to a party for serving a subpoena. *It seems*, that the practice has not been under the Code, to allow anything for subpoenaing witnesses. It is a service which a party may always perform himself.

Ontario Special Term and Circuit, January, 1858.

MOTIONS by plaintiff and defendant for re-adjustment of plaintiff's costs, and by plaintiff for re-adjustment of defendant's costs.

In August last an order was made on application of the defendant that he, the defendant, recover costs under section 885 of the Code, and that such costs be set-off against the recovery of the plaintiff. That motion was resisted on the ground that the offer of judgment was insufficient. But the offer was held sufficient.

See the statement of the facts in the case as reported on that motion, *ante*, p. 420.

The costs of the plaintiff and defendant were subsequently adjusted by the clerk of Ontario county; that of the plaintiff at \$19.14, and of the defendant at \$78.53. The plaintiff's

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bill as presented to the clerk for adjustment, amounted to \$36.23.

The defendant's counsel objected to the allowance of any costs to the plaintiff, which objection was overruled by the clerk.

Objections were made by the plaintiff's counsel to various items in the defendant's bill, which, with the objection to the plaintiff's costs, are considered in the following opinion.

S. BALDWIN, *for plaintiff*.

F. E. CORNWELL, *for defendant*.

WELLES, Justice. It is conceded by the defendant's counsel, that if the plaintiff is entitled to costs at all, the bill is properly taxed at \$19.14.

But he appeals from the taxation, on the ground, that as he claims, the plaintiff is not entitled to any costs. Section 385 of the Code, after providing that the defendant may serve an offer on the plaintiff allowing him to take judgment, &c., and that the plaintiff may serve a notice of acceptance, &c., concludes as follows: "If the notice of acceptance be not given, the offer is to be deemed withdrawn, and cannot be given in evidence; and if the plaintiff fail to obtain a more favorable judgment, he cannot recover costs, but must pay the defendant's costs from the time of the offer."

The question arises upon the provision of the section, declaring that when the plaintiff fails to recover a more favorable judgment than the defendant offered to allow him to take, "he cannot recover costs." When the offer was made, the plaintiff was entitled to costs up to that time, and if the law now denies it to him, it can be regarded in no other light than a penalty for not accepting the offer. This, I think, was not the intention of the legislature. The construction of the section should be the same as if the word "after" had followed the word "costs," so that the expression would have been in the following words: "he cannot recover costs after, but must pay the defendant's costs from the time of the offer." This I

think must be the true reading of the section. (*Keese agt. Wyman*, 8 *How. Pr. R.* 88.)

The items stricken out of the plaintiff's bill which accrued after the offer, were properly rejected. The plaintiff was not entitled to any costs, whether disbursements or otherwise, after the offer was served. I think the plaintiff's costs were properly adjusted, excepting that the item of interest must be modified as hereinafter directed.

As to the defendant's costs, the first item is for "proceedings subsequent to offer, and before notice of trial, \$10." This item must be wholly disallowed. No proceedings could be or were taken by the defendant after the offer, and before notice of trial.

The next item is "subsequent proceedings before trial, \$10." It is objected that this should be only \$7, instead of \$10. The objection must prevail. The cause was tried and verdict rendered in February, before the amendment of the Code in April following. The right of each party to costs was fixed on the coming in of the verdict. The law then settled their rights in that respect, and the delay in adjusting the costs cannot affect the rates of allowance. (*Moore agt. Westervelt*, 14 *How. Pr. R.* 279; *Hunt agt. Middlebrook*, *id.* 300.)

The next item is "trial fee, \$20." On the same principle, this must be reduced to \$12. There must be thirty-seven and a half cents deducted from the charge for affidavits, as it appears that three of them were made for a motion in the cause where no costs were allowed. Another item objected to is as follows: "clerk's fee, entry and copy judgment, \$1.65." This charge is disallowed on the ground that the item is chargeable by the clerk to the plaintiff, and not to the defendant.

The only remaining charge objected to is: "paid fees of Hiram Peck, constable of Canandaigua, for travel and serving subpoena on Elbridge Farwell, of Holley, \$5.42." This item must be disallowed. There is no law for allowing anything to a party for serving a subpoena. The provision found in section 311 of the Code respecting disbursements, cannot con-

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template payments made for serving subpoenas; such allowances would be intolerable. Cases might arise where such charges in a bill, if allowable, would exceed in the aggregate, all the other costs in the cause. I understand the practice has not been, under the Code, to allow anything for subpoenaing witnesses. It is a service which a party may always perform himself; and I can see no more propriety in the charge than there would be in charging the party's own personal expenses for railroad or stage fare, or livery stable or hotel bills necessarily incurred in going to, attending at, and returning from the trial.

The defendant's bill must be re-adjusted by the clerk upon the principles above stated; and there must be a re-statement of interest, deducting from the amount of the verdict, and plaintiff's costs as adjusted without the item of interest charged, the amount of the defendant's costs after the same shall have been re-adjusted as herein directed, and the interest computed on the balance from the time the verdict was rendered, to the time judgment shall be entered and docketed; no costs of these motions to be charged to either party.

SUPREME COURT.

EDWARD BRODERICK and another agt. ABISHA SMITH.

If there is any one action more than another pre-eminently the subject of jealous supervision by courts of equity, it is the action for *foreclosure of mortgages*. Where mortgagees have taken advantage in any way of mortgagors, or where there has been a mistake, injurious to the latter, of which the former ought in conscience to have apprised them, a court of equity, so far from lending its assistance to consummate the wrong, will interpose to repair it.

The defendant in this case was relieved from the payment of the *principal moneys* secured by his bond and mortgage, in an action of foreclosure, and the plaintiffs' complaint dismissed under the following circumstances: In September, 1855, the plaintiffs agreed with the defendant to convey to him certain premises on the 2d November, 1855, on receiving from defendant \$500, in ad-

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dition to \$1,500, which they had already received from him. It was also agreed that the defendant should give the plaintiffs his bond and mortgage (on the premises,) for \$4,000, the balance of the purchase money, payable on the 27th June, 1860, with interest half yearly. The conveyance, and bond and mortgage were to bear date on the 27th June, 1855.

The bond and mortgage contained a clause, that should any default be made in the payment of the interest, or any part thereof, on any day when the same is made payable, and should the same remain unpaid for twenty days, that then the principal sum (\$4,000) shall, at the option of the plaintiffs, become payable immediately thereafter. On the 2d of November, 1855, the defendant was ready, and offered to perform his agreement, but the plaintiffs were unable to give an unincumbered title to the premises, by reason of a judgment docketed against them in July previous, and which remained uncanceled, and was a lien on the premises.

The defendant consented to waive his right to rescind the agreement on his part, and was induced by the plaintiffs to fulfil it, by receiving from them a written agreement that they would, within 90 days, cause the judgment to be cancelled, or would deposit the amount of the judgment in the hands of the defendant, until it should be discharged. The first half year's interest became due on the 27th December, 1855; the plaintiff procured the judgment to be discharged on the 31st of December, 1855, but no notice of it was given to the defendant, and he had no knowledge of it until the 24th January, 1856. The twenty days for payment of the interest expired on the 17th of January, 1856. On the said 24th of January, the defendant not having paid the interest, was required by plaintiffs' attorneys, without any previous intimation from any person, to pay the principal and interest on his bond and mortgage. The defendant tendered the interest and costs, which was refused by the plaintiffs' attorneys, and was paid by him into court.

SUTHERLAND, J., *dissemed, holding*, that outside of the agreements, there was not an act or declaration of the plaintiffs appearing, to mislead the defendant, and estop them from enforcing their rights under the written contracts. There not being in the case a pretence of any surprise, mistake or fraud in the execution of the agreements, out of which the rights of the parties arose, he did not see how the decision of the court at special term could be sustained, without setting aside the agreement which the parties themselves had made, and making a new one for them.

New-York General Term, February, 1858.

Before DAVIES, CLERKE and SUTHERLAND, Justices.

APPEAL from an order at special term dismissing the plaintiffs' complaint on a mortgage foreclosure.

A. C. BRADLEY, *for plaintiffs.*

ROBERT EMMET, *for defendant.*

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By the court—CLERKE, Justice. This is an action to foreclose a mortgage under the following circumstances: in September, 1855, the plaintiffs agreed with the defendant that they would convey certain premises to him on the 2d of November following, on receiving from him five hundred dollars, in addition to fifteen hundred dollars, which they had already received from him. It was also agreed, that he should give them his bond for four thousand dollars—the remainder of the purchase money—to be secured by a mortgage on the premises, payable on the 27th day of June, 1860, with interest half yearly. The conveyance, and bond and mortgage were to bear date, 27th June, 1855.

The bond and mortgage contained a clause, that should any default be made in the payment of the interest, or any part thereof, on any day when the same is made payable, and should the same remain unpaid for twenty days, that then the principal sum (\$4,000) shall, at the option of the plaintiffs, become payable immediately thereafter. On the 2d of November, 1855, the defendant was ready, and offered to perform the agreement on his part; but the plaintiffs were unable to give an unincumbered title to the premises by reason of a judgment, which had been docketed against them in July previous; and which remained uncanceled, and was a lien on the premises.

The defendant consented, at the solicitation of the plaintiffs, to waive his right to rescind the agreement, and receive back the \$1,500, and was induced by them to accept a conveyance of the premises, to pay the additional \$500, and to give his bond and mortgage for the \$4,000, containing the above-mentioned clause. He, at the same time, received from them a written agreement, that they would, within ninety days, cause the judgment to be cancelled, or would deposit the amount of said judgment in his hands, until it should be discharged. This arrangement was made on the said 2d day of November, 1855.

The first half year's interest, according to the terms of the bond, became due on the 27th December, 1855; the plaintiffs procured the judgment against them to be cancelled on the

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31st December, 1855; but no notice was given to the defendant of the cancelment, nor had he any knowledge of it, until the 25th January, 1856. The twenty days mentioned in the bond expired on the 17th of January, 1856; on the 24th of January, the defendant was required by plaintiffs' attorneys, without any previous intimation from the plaintiffs or any other person, to pay the principal and interest on his bond and mortgage. He, thereupon, caused the interest to the 27th December, 1855, with interest upon that interest to date of tender, to be tendered to the plaintiffs and their attorneys. The tender was refused; and this action was commenced to foreclose the equity of redemption in the premises.

It will be seen, from this statement, that the defendant allowed the twenty days for payment of interest to elapse, under the impression that the plaintiffs had not procured the judgment, which was a lien on the premises, to be cancelled. When the interest became due on the 27th of December, 1855, the judgment remained uncanceled; after it was cancelled, no notification of it was given to the defendant; and no demand of interest was made, or the slightest intimation given, that payment of it would be required, according to the strict terms of the bond. Usually, when no stratagem is intended, the obligee calls or sends for his interest. But the plaintiffs allowed the twenty days to elapse without uttering a hint; when they supposed that the default was irrevocable, and that they were entitled to exact prompt payment of the whole principal and interest; and in failure of this to foreclose the defendant's equity of redemption.

Nothing was more natural, under these circumstances, than for the defendant to suppose that the plaintiffs would not require the payment of the interest (\$140) until the lien on his property (for \$518 18-100) should be cancelled; and, I think, it was contrary to all equitable dealing for the plaintiffs to take advantage of these circumstances, instead of apprising the defendants of the cancelment, and in due time, before the expiration of the twenty days, claiming the payment of the interest. This was oppressive and unreasonable conduct on the

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part of the plaintiffs; and one of the principal and benign functions of a court of equity is to afford protection against such conduct, when a suitor attempts to avail himself of it by the instrumentality of a strict legal right. And more especially in a case like the present, when the plaintiffs seek the interposition of a court of equity to enforce a remedy, under circumstances which no court can avoid considering unconscionable, it will refuse to give its aid and countenance for such a purpose.

If there is any one action more than another, pre-eminently the subject of jealous supervision by courts of equity, it is the action now under consideration. All transactions between mortgagor and mortgagee have been always closely scrutinized by them; and when the latter has taken advantage in any way of the former, or where there has been any detriment or hardship resulting from the inequality of their relative positions, and when there has been a mistake, injurious to the former, of which the latter ought, in conscience, to have apprised him, a court of equity so far from lending its assistance to consummate the wrong, will interpose to repair it. This is not an arbitrary interference with the substantial and essential provision of a contract; it is shielding innocent or unfortunate persons against the unscrupulous perversion of them; it is interposing to prevent the employment of legal forms for purposes, which legal forms were never designed to promote. The action to foreclose an equity of redemption, and, indeed, permitting an equity of redemption to exist by courts of equity, is a proof of this. It was instituted for the express purpose of mitigating the hardship of a strict legal right. By the terms of the mortgage, if the day limited should pass without payment of the debt and interest, the estate, as we all know, would absolutely vest in the mortgagee, to the extent to which it is conveyed, free from the claims of the mortgagor. Courts of equity, seeing that it might, perhaps, be forfeited, according to the letter of the instrument, for a sum equivalent to a small portion of its actual value, interposed, and ordained that the mortgagor must have a further opportunity of paying what is

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due, and of redeeming the land. Now, this is sanctioned and regulated by statute; and the mortgagee so far from being entitled to the ownership of the land, as provided in the contract, is only entitled to have it sold after due notice, and a considerable lapse of time; and if it bring more than the debt, the mortgagor is entitled to the surplus. If the court, then, has power to interpose, so as to change the whole character and effect of the instrument, it assuredly has power to modify the effect of a single clause of it, relating to the period limited for the payment of interest. All that the mortgagee in either case ought to require is, that he should be secured against injury, and that he should derive all the benefit, that natural justice demands.

The judgment of the special term should be affirmed with costs.

SUTHERLAND, Justice, delivered the following dissenting opinion:

I cannot agree with my associates, in their conclusion to affirm the judgment of the special term, in this case. I think that judgment should be reversed with costs.

On the second day of November, 1855, the plaintiffs conveyed to the defendant, Smith, a certain lot of land in the city of New-York, for the consideration of six thousand dollars, and, at the same time, Smith executed to the plaintiffs his bond and a mortgage on said premises for four thousand dollars of the consideration money.

The bond and mortgage were dated back, the 27th day of June, 1855, for reasons stated in the defendant's answer, which are admitted by the plaintiffs; and the case stands precisely as if the bond and mortgage had been executed the 27th day of June, 1855, the day they bear date.

The bond was conditioned for the payment of the said sum of four thousand dollars, on the 27th day of June, 1860, with interest thereon, half yearly. The condition of the bond also contained a special agreement, that in case the interest, or any part thereof, should not be paid on the day when the same

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was payable, and should remain unpaid, and in arrear for the space of twenty days, then the principal sum of four thousand dollars, with all arrears of interest thereon, should, at the option of said plaintiffs, become due and payable immediately thereafter, although the period first above mentioned for the payment of the principal sum might not have expired.

On the 27th day of December, 1855, one half year's interest fell due. It was not paid on that day, and remained unpaid for twenty days thereafter; and thus the principal as well as interest was due and payable on the 17th day of January, 1856, according to the special agreement inserted in the condition of the bond.

The mortgage recites the condition of the bond, including the special clause or agreement by which the whole principal was to be due and payable, in case the interest remained due for twenty days; and was given to secure the payment of the bond.

On the 24th day of January, 1856, the plaintiffs' attorneys notified the defendant, that the bond and mortgage had been placed in their hands for collection, and that the same had, by the terms thereof, become due and payable.

This suit was commenced on the 4th day of February, 1856, to foreclose the mortgage, the plaintiffs claiming that the principal as well as interest was due and payable.

On the 25th day of January, 1856, the defendant offered to the plaintiffs' attorneys the half year's interest, which fell due on the 27th day of December, 1855, with interest on the interest, and to stipulate in writing, to pay the costs of the plaintiffs in this action, on their being adjusted. This offer was declined.

On the 2d day of November, 1855, the plaintiffs were unable to give an unincumbered title to the premises, by reason of a judgment for \$518 18-100, which had been recovered against them in July previous, and which was a lien on the premises. But the defendant, at the request of the plaintiffs, consented to accept, and did accept the deed, and execute the bond and mortgage, on the plaintiffs executing to him a writ-

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ten agreement, that they would within ninety days from that time, cause said judgment to be cancelled or removed, so that the same should cease to be a lien, or deposit the amount of the judgment in the hands of the defendant, to be held until such judgment should be discharged.

The judgment was cancelled on the 31st day of December, 1855; but the defendant received no notice thereof, nor had he any knowledge of such cancelment, until the 25th day of January, 1856.

On these facts, the defendant having paid into court the interest due on the 27th day of December, and the interest thereon, the judgment of the special term, was, that the complaint should be dismissed.

Now there not being in this case a pretence of any surprise, mistake or fraud in the execution of the papers or agreements, out of which the rights of the parties arise, I do not see how the judgment of the special term can be sustained, without setting aside the agreement which the parties themselves made, and making a new one for them.

The plaintiffs having the right of disposing of their property, the principle is clear, that they had the right of disposing of it on such terms as they thought proper to fix, provided they were not illegal, or so unreasonable that the law would presume them void. (*Roe agt. Galliers and others*, 2 Term Rep. 183.)

Was the agreement of the defendant, that if the interest remained unpaid for twenty days, then the whole principal sum should be due and payable, illegal, or so unreasonable, that the law pronounced it void?

It was neither illegal nor unreasonable. Why then should it not be enforced? If public policy, *not declared either by the common law or by statute*, is a legitimate principle, upon which either courts of law or of equity, can declare contracts between individuals, void, (which I do not admit,) what has public policy to do with the time or the contingency at which or upon which a simple contract debt shall become due or payable?

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It is the policy of law and of the public, that individuals should be left to make their own bargains, and regulate their own affairs, except as restrained by law, or their public duties.

Admitting that there are certain cases, in which a court of equity will relieve from a forfeiture, upon what principle is it said, that the plaintiffs in this action seek to enforce a forfeiture? They seek to foreclose their mortgage because they say it is due. If it is due, it is a common case of foreclosure; and the foreclosure of this mortgage, is no more the enforcement of a forfeiture, than any other case of foreclosure.

Is the mortgage due? It is, if the defendant's express agreement is valid, and is to be enforced. Is the enforcement of it, the enforcement of a forfeiture? If enforced, what will the defendant have to pay? The principal and interest. If not enforced, and the defendant is relieved from his own default, what will he have to pay in 1860, when the mortgage becomes due, without reference to the special interest clause? Principal and interest, and nothing more. How can the enforcement of the payment of a debt, with the legal interest and nothing more, be called the enforcement of a forfeiture? What would the defendant have forfeited, by paying his debt with interest in 1856, rather than in 1860 with interest; the rate of interest being fixed by law; he paying the same rate in either case?

Had money cheapened, and the defendant been able to procure the principal at five per cent., and pay off the mortgage in 1856, he certainly would not have complained, nor called his payment then a forfeiture. As he agreed to pay seven per cent., the lawful interest, how could the payment of the mortgage, with seven per cent., in 1856, be called a forfeiture? I can see no reason for calling this foreclosure the enforcement of a forfeiture. The plaintiffs ask for no more than they bargained for; and the defendant could not have been compelled to pay any more than he agreed to pay.

The parties agreed, that in default of the payment of the interest for a certain number of days, the whole principal should be due and payable sooner than it otherwise would.

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It was lawful for them so to agree, and if the default happened, if the contingency occurred, the principal thereupon became due and payable by the special agreement of the parties, as it would in 1860, without such special agreement.

What more is there in this case? Was it the plaintiffs' fault, or owing to their laches, that the defendant did not pay the interest within the twenty days? What equity has the defendant, what grounds for relief, growing out of the plaintiffs' agreement to discharge the judgment, which was a lien on the mortgaged premises, executed at the same time the bond and mortgage were executed?

The plaintiffs, by their agreement, agreed to cancel the judgment, or to deposit the amount thereof in the hands of the defendant within ninety days; say, on or before the first day of February, 1856. The defendant, by his bond or agreement, executed at the same time, agreed to pay one half year's interest on the \$4,000 to the plaintiffs, on the 27th day of December, 1855.

How can the defendant say that his payment of the interest on the 27th of December, 1855, was dependent on the plaintiffs' discharging or depositing in his hands the amount of the judgment on the first of February, 1856, more than a month after the interest became due? Did the plaintiffs' agreement to discharge the judgment within three months, revoke the defendant's agreement to pay the interest within two months?

The parties must be presumed to have known and understood what they mutually agreed to, and to have intended then to fulfil their respective agreements.

The agreements were in no way dependent upon each other. The defendant's undertaking to pay the interest, was not upon condition that the plaintiffs removed their lien of the judgment.

To permit the defendant to set up in this action, in bar of the plaintiffs' right of foreclosure, the want of notice that the judgment had been cancelled before the twenty days expired, is in effect to make a new contract between the parties, and

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by it to take away the plaintiffs' rights, under the agreements actually made by the parties themselves.

The judgment was, in fact, cancelled or removed on the 31st day of December, 1855.

Neither the plaintiffs' written agreement, nor any principle of equity or fair dealing, outside of it, that I can see, called upon the plaintiffs to notify the defendant that the judgment had been cancelled, as a condition of their right to exact from the defendant the fulfilment of his agreement. The defendant had no right to expect, or to wait for such notice before he paid the interest. If he had gone and paid the interest at any time within the twenty days, it would have been natural for him to have asked whether the judgment had been cancelled, and he then probably would have been informed that it had.

If the plaintiffs had not removed the lien of the judgment, or deposited the amount thereof with the defendant, within the ninety days as agreed, then the amount of the same should have been deducted from the mortgage, but I cannot see how a breach of the plaintiffs' agreement, on the first of February, could have justified a breach of the defendant's agreement on the 27th of December previous, and the continuous default of the defendant, for twenty days thereafter.

Outside of the agreement, I do not find an act or a declaration of the plaintiffs to mislead the defendant, and estop them from enforcing their rights under the written contracts.

I think, therefore, the judgment of the special term should be reversed with costs.

Judgment affirmed.

SUPREME COURT.

WILLIAM H. FERRY agt. THE BANK OF CENTRAL NEW-YORK.

The plaintiff, a stockholder of the bank, brought his action against the defendant, (in October, 1857,) under the provisions of law regulating "proceedings against corporations in equity;" (2 R. S. 461;) and with the consent of the defendant, represented by counsel, an order was made by the supreme court at general term, enjoining the defendant from the exercise of its corporate functions and franchises, and appointing a receiver of its property and effects, upon the allegation of insolvency.

The receiver took possession of the property of the association, and made collections, &c. In January, 1858, the defendant upon statements, showing as was claimed, that it was solvent, asked the court that the order for an injunction and appointing a receiver be discharged, and that leave be granted to it, to resume the business of banking, under the articles of association. This relief was asked upon three grounds. 1st. That the injunction was irregular, having been granted without the giving of a bond, or undertaking against loss or damage, &c.

2d. That the provisions of the Revised Statutes for proceedings against corporations in equity, (2 R. S. 461,) were repealed by chapter 226 of the laws of 1849, (*Sess. Laws*, 1849, p. 340,) entitled "An act to enforce the responsibility of stockholders in certain banking corporations and associations, as prescribed by the constitution, and to provide for the prompt payment of demands against such corporations and associations," and,

3d. That the defendant was not, and is not, "insolvent," within the intent of the provision of law under which the action is commenced and prosecuted. (2 R. S. 463, § 39, &c.)

Held, 1st. That whether a bond was necessary in such a case, was not properly before the court, or necessarily involved in this application; for the reason that the provision regulating the giving of a bond in any case, is for the benefit of the party enjoined, and of course might be waived by consent, as was done in this case. Besides, the dissolution of the injunction would not restore the defendant to its property or corporate rights, without a discharge of the receivership, and of consequence would afford no substantial relief to the parties.

Held, 2d. That this second question was one of too much importance to be hastily decided at special term, unless necessary to the determination of a pending matter, and as it was not essential to pass upon it upon this motion, it was not fully considered. But the judge was of the opinion that the design of the framers of the act of 1849, was to provide a cheap and expeditious mode of winding up the affairs of an insolvent corporation, or banking association, as a

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substitute for the more dilatory and expensive process by action; and to provide substantially a remedy for stockholders and creditors, which should reach every case that might arise, and for which provision should be made for closing up of the affairs, and dissolving a corporation or association for banking purposes, at the instance of stockholders and creditors.

Held, 3d. That there was not so much difficulty in defining *insolvency*, when applied to moneyed corporations, as in determining what in a particular case, or class of cases, should be the evidence of insolvency, or present inability to pay debts and fulfil engagements. The definition and illustration of "insolvency," fully considered as applicable to various classes of business in trade, banking, &c.

If the inability of a bank to meet its undertakings, arises solely from an unexpected crisis, like that through which we have just passed, or are now passing, and exhibits resources abundantly sufficient to enable it to meet its engagements, and discharge its liabilities in the ordinary and usual method of conducting that business, it should not be pronounced insolvent, with a view to its dissolution. The question is, whether with its own resources, it can pay its debts, and be in a situation to conduct its business in the ordinary course, and as banks usually do?

If a bank is so circumstanced as to depend upon the individual resources and exertions of its directors and stockholders, and compelled to rely upon their private funds to meet its engagements, and only claims to be able to pay at a future day, it could not be said to be solvent.

In this case, the inference to be drawn from the complaint was, that the assets of the defendant were more than sufficient to pay its liabilities, and but for the peculiar character of the times, which affected all similar institutions, it would have gone on without interruption with its usual business. Motion granted.

Oneida Special Term, January, 1858.

IN October last, upon the application of the plaintiff in this action, and by the consent of the defendant, represented by counsel, an order was made by this court at general term, enjoining the defendant from the exercise of its corporate functions and franchises, and appointing a receiver of its property and effects, upon the allegation of insolvency.

The action was brought by the plaintiff as a stockholder under the provisions of law regulating "proceedings against corporations in equity." (2 R. S. 461.) The receiver has taken possession of the property of the association, and made collections, &c., and now the defendant, upon statements showing as is claimed, that it is solvent, asks that the order for an injunction and appointing a receiver be discharged, and that

leave be granted to it to resume the business of banking, under its articles of association.

G. W. SMITH and T. JENKINS, *for the motion*.

M. H. THROOP and F. KERNAN, *contra*.

W. F. ALLEN, Justice. The defendant asks for relief upon this motion, upon three principal grounds. 1st. That the injunction was irregular, having been granted without the giving of a bond or undertaking, against loss or damage to ensue from the injunction, if it should be finally adjudged that the plaintiff was not entitled to that process. 2d. That the provisions of the Revised Statutes for proceeding against corporations in equity, (2 R. S. 461,) were repealed by chapter 226 of the laws of 1849, (*S. Laws*, 1849, p. 340,) "An act to enforce the responsibility of stockholders in certain banking corporations and associations, as prescribed by the constitution, and to provide for the prompt payment of demands against such corporations and associations." 3d. That the defendant was not and is not "insolvent," within the intent of the provision of law under which the action is commenced and prosecuted. (2 R. S. 463, § 39 and seq.)

Whether a bond is necessary in a case like the present, upon the granting of an injunction by the court, upon notice to the corporation or association proceeded against, is not properly before me, or necessarily involved in this application.

It is not before me, for the reason that the provision regulating a bond in any case, is for the benefit of the party enjoined, and of course may be waived by him, and in this case, the giving of the bond, if one was necessary, was waived by the defendant, by consenting that the injunction issue upon the papers read and without requiring a bond. By this consent, the defendant is estopped from now objecting to this defect, if the proceedings are really objectionable for that reason. It is not necessarily involved in the application, for the reason that the dissolution of the injunction will not restore the defendant to its property or corporate rights, without a discharge of the

receivership. The receiver having the possession of the property and rights in action of the defendant, a dissolution of the injunction for the irregularity complained of, would afford no substantial relief to the parties.

The second question made, is one of more importance and of more difficulty. I am of the opinion that the design of the framers of the act of 1849, was to provide a cheap and expeditious way of winding up the affairs of an insolvent corporation or banking association, as a substitute for the more dilatory and expensive process by action, and to provide substantially a remedy for stockholders and creditors, which should reach every case that might arise, and for which provision should be made, for closing up of the affairs and dissolving a corporation or association for banking purposes, at the instance of stockholders and creditors.

Creditors for any amount, having judgment against the association not collectible by execution, may proceed under the provisions of the act, and creditors having demands exceeding in amount \$100, can proceed summarily if their debts remain unpaid for ten days after demand; and preferences in the payment of debts by corporations insolvent or in contemplation of insolvency, are expressly prohibited by the act to prevent the insolvency of moneyed corporations. (1 R. S. 591, § 31; *Leavitt agt. Tyler*, 1 Sand. C. Rep. 207; *Brower agt. Harbeck*, 5 Seld. 588.)

In view of these statutory regulations assigned to secure equality among the creditors of insolvent corporations, there was no serious danger of loss to the general creditor by the delay of ten days after demand of payment of his debt.

In regard to stockholders, it was a question for the legislature, whether the owners of stock to an amount less than one-tenth, should be permitted to take steps for the dissolution of an association, into which they had voluntarily entered with their associates, so long as the corporation was prosecuting its ordinary business and actually paying its liabilities as they accrued. The bill was introduced by the present superintendent of the banking department, and in his report of the bill to the senate

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as chairman of the committee to which it was referred, he says : "One feature of the bill (in addition to the provision for the protection of the stockholders, and for whom there is little or none now offered by our laws against the fraudulent conduct of bank officers) is, that it prevents numerous and vexatious suits against stockholders in cases of insolvency." "This feature of the bill is one that cannot but commend itself to the attention of the senate, as it entirely prevents numerous suits, not only of creditors against stockholders, but of stockholders against each other, while the creditor is protected, without the necessity of bringing perhaps several suits to satisfy his demand. The committee fully believe that delay in the final settlement of the affairs of insolvent corporations and associations, is fatal to the interests of both creditor and stockholder. The proverbial slowness with which our insolvent banks have been wound up, they trust will be fully obviated in this act." "The leading features of the bill are : 1st. To declare the liability which equitably exists under the constitution. 2d. The speedy remedy of both creditor and stockholder of insolvent institutions, &c." (*Senate Documents of 1849, No. 42.*) The act read in connection with the report of the committee, furnishes satisfactory evidence of the design of the originators of the bill to provide a substitute for the remedy given by the Revised Statutes to creditors and stockholders of insolvent corporations and associations for banking purposes.

Another reason for the inference that the framer of the act of 1849, designed and intended that act to provide a simple and uniform remedy for closing up insolvent banks and banking associations applicable to both, and which should supercede all other remedies given by law, is, that at the time of the passage of that act, it was not as well settled as it now is, that banking associations are subject to all the provisions of law relating to moneyed corporations. The decisions in *Gillett agt. Moody*, (8 Comst. 485;) *Talmadge agt. Pell*, (8 Seld. 328,) and *Gillett agt. Phillips*, (8 Ker. 114,) settle the question that they are subject to all such provisions, excepting when they are inconsistent with the "act to authorize the business of

banking," and the acts amending the same. It is not necessary that a subsequent act should be repugnant in all its provisions to a former one, in order to repeal the latter by implication. If the latter statute was clearly intended to prescribe the only rule that should govern in the case provided for it repeals the original act. (*Davis agt. Fainlaine*, 3 How. U. S. R. 636; *Dexter agt. Limerick P. R. Co.*, 16 Barb. 15. See *Commonwealth agt. Kimball*, 21 Pick. 375; *Leyster agt. Walker*, 9 N. H. R. 61; *Gage agt. Connor*, 4 Pick. 399.) The judges of this court, in the first and second districts, have agreed that the act of 1849 does supercede the provisions of the Revised Statutes in all cases in which the former act is applicable, and that a creditor of the bank who may have relief under that act, cannot proceed under the Revised Statutes. By parity of reason, a stockholder who could proceed under the act of 1849, would be precluded from availing himself of the remedy given by the Revised Statutes.

I have not seen the reasons for the opinions of the judges, nor the opinion in the case of *Livingston agt. The Bank of New-York*, (5 Ab. P. R. 338,) and therefore do not know to what extent they would deem their conclusions applicable, or whether the rule should exclude all creditors and all stockholders from proceeding for the dissolution of a banking association, except in accordance with the act of 1849. So far as they have put forth a rule of construction and action as between the two acts, I am inclined to acquiesce in its correctness. I am aware that the policy of the law does not favor the repeal of statutes by implication, and that ordinarily there must be a clear repugnance between the two statutes before the latter will be held to operate as a repeal of the former in the absence of a repeal in terms, and that courts hold against the repeal when both can stand together. These two statutes cannot be said to be so repugnant to each other that they cannot in many things stand together. But they act upon the same subject, and are designed to give relief in part to the same class of persons, and the only theory upon which they can stand together is, that the legislature intended to prescribe two distinct pro-

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ceedings to accomplish the same purpose, and to give creditors and stockholders the option of proceeding under either. The question is one of too much importance to be hastily decided at special term, unless necessary to the determination of a pending matter, and as I do not deem it essential to pass upon it upon this motion, I will not further consider it.

The only remaining ground urged by the counsel for the defendant, was as to the solvency of the institution at the time the proceedings were instituted and at present. The language of the act under which the action was commenced, is: "Whenever any corporation having banking powers, or having the power to make loans on pledges or deposits, or authorized by law to make insurances, shall become insolvent or unable to pay its debts, &c., the court of chancery may by injunction restrain, &c." (2 R. S. 468, § 39.) There is not so much difficulty in defining insolvency when applied to moneyed corporations, as in determining what in a particular case, or class of cases, shall be the evidence of insolvency. Insolvency in the abstract, has the same signification, whether applied to corporations or associations, and means a general inability to pay one's debts; an inability to fulfil one's obligations, according to his undertaking; a general inability to answer in the course of business, the liabilities existing and capable of being enforced. Not an absolute inability to pay one's debts at some future time, upon a settlement and winding up of all a trader's concerns, but as not being in a condition to pay one's debts in the ordinary course, as persons carrying on trade usually do. (*Brower* agt. *Harbeck*, 5 *Seld.* 589, and cases cited; 2 *Bell's Com.* 162; *Thompson* agt. *Thompson*, 4 *Cush.* 134; *Mitchell* agt. *Gazzen*, 12 *O. R.* 335; *Herrick* agt. *Borst*, 4 *Hill*, 654.) The question as to actual or contemplated insolvency, has most frequently arisen under bankrupt and insolvent laws, and in testing the validity of transactions sought to be avoided under acts of the like character, and has been rather as to the evidence of insolvency, either actual or contemplated in each particular case, and under a particular statute, than as to what constituted insolvency generally. The latter question did not

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arise at all in *Brower* agt. *Harbeck*. The insolvency of the company was conceded and palpable within any definition of the term, and in reference to future as well as present ability to pay. The question in every case is as to the evidence of insolvency or present inability to pay debts and fulfil engagements.

An inability to pay arising from unexpected and unforeseen contingencies, would not alone be evidence of insolvency within the statute under consideration, or any concerning bankruptcies and insolvencies. A merchant or trader, who should be driven to protest, by the failure to receive an expected remittance, or the bankruptcy of a debtor, upon whom he had relied, would not for that reason be deemed insolvent, and yet he would have failed to fulfil his obligations according to his undertaking.

If from taking a reasonable view of his situation and the surrounding circumstances at the time, it could fairly be seen that he was able not only ultimately to pay his debts, but could at once recover from the temporary embarrassment and derangement of his business, by a proper application of his means, and could carry on his business and meet his engagements in the ordinary course, and as persons in the same business usually do, he would properly be called solvent. So too, if the present inability to pay was the result of a crisis, a peculiar stringency in the monetary affairs of the country, instead of the failure of one individual, and one source of supply, and by which he was cut off temporarily from the resources upon which he was accustomed to rely, and upon which traders in like circumstances are accustomed to rely, the effect would be the same on the general question of insolvency.

It is no evidence of insolvency that a trader habitually relies upon anticipating the payment of his bills receivable, by procuring them to be discounted to meet his engagements, or procuring loans upon his own credit, relying upon collections to repay the loans.

This usual reliance may fail him, and he be left unable to meet his engagements, and yet be far from insolvent within

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any definition of the term. The same principle applies to banking corporations and associations. The liabilities of these institutions payable presently, always exceed very largely the present absolute ability to pay. Every dollar of their circulation and their entire deposits, are subject to call, and may be demanded in a single day, and yet it is well known that no bank keeps on hand either in coin or bills of solvent banks an amount equal to one-tenth of the obligations which they are legally bound to answer on demand. The law recognizes this fact in the provisions which it makes for giving fifteen days for the redemption of bills transmitted under protest to the banking department, and ten days for the payment of demands presented before proceedings can be had for the dissolution of corporations and associations, on account of such non-payment. (*Laws of 1851, p. 377, § 4; Laws of 1843, p. 342, § 7.*)

The institutions themselves, rely upon their ability to meet their engagements not at one time and upon demand, but according to the course of business. This dependence, aside from their ultimate and final ability to pay to the extent of their obligations, is upon the general and known course of business, by which they are enabled to calculate upon the average amount of deposits, and the length of time which they are permitted to remain, and the rate at which their circulation will be returned for redemption. 2dly. Upon their ability in any emergency that may arise, to realize upon their assets by negotiating their bills receivable, or in some other legitimate and customary way, making their resources available for present purposes. Both these resources may fail in times of general distrust and monetary pressure, and leave a banking institution with abundant resources, unable upon an unexpected emergency and unusual call, to meet its engagements.

If the inability of a bank to meet its undertakings, arises solely from an unexpected crisis, like that through which we have just passed, or are now passing, and exhibits resources abundantly sufficient to enable it to meet its engagements and discharge its liabilities in the ordinary and usual method of

conducting that business, it should not be pronounced insolvent with a view to its dissolution.

The question is, whether with its own resources it can pay its debts, and be in a situation to conduct its business in the ordinary course and as banks usually do. If a bank is so circumstanced as to depend upon the individual resources and exertions of its directors and stockholders, and compelled to rely upon their private funds to meet its engagements, and only claims to be able to pay at a future day, it could not be said to be solvent.

In this case, neither the complaint nor the affidavits and papers used in opposition to this motion, suggest or show that up to the time of the "pressure and distrust in the money market," which is put forth in the complaint as the reason why the defendant could not make its bills receivable available to pay its debts, the bank had experienced any difficulty in meeting its current engagements, or had been compelled to resort to any extraordinary or unusual means to raise funds for their payment.

The complaint alleges that the payment of ten thousand dollars of its bills had been demanded, and that the bank had not the means of payment, and could not then raise them, and this fact is denied by the defendant.

The inference to be drawn from the complaint is, that the assets of the defendant are more than sufficient to pay its liabilities, and but for the peculiar character of the times, which affected all similar institutions, it would have gone on without interruption with its usual business. The statement of the affairs of the bank upon which the motion is made, shows a large surplus after the payment of all debts, and the facts are not contradicted by the plaintiff.

That statement is not to any great extent more favorable to the defendant than the expose of its creditors made by the complaint, the defendant shows :

Liabilities,

\$147,760

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Resources, bills receivable, (good,)	100,000
Bonds and mortgages, good,	8,000
Over drafts,	800
Arkansas stock,	4,000
New-York state stocks,	32,000
Michigan and Illinois stocks,	6,600
Bonds and mortgages deposited,	31,945
Real estate,	25,000
Cash,	12,000
	220,045
Surplus,	\$72,285

The complaint shows a surplus of \$22,850 .

The actual liability of the defendant other than to billholders is but \$80,060, thirteen thousand dollars of the \$98,060 being deposited in part payment of bills payable to the bank. The discrepancies in the two statements is accounted for by the fact, that the cashier in his affidavit undertakes to state the liabilities with accuracy and from personal knowledge, while the plaintiff makes his statement from information and belief. It is probable that some, and perhaps considerable allowance should be made from the apparent balance, in order to arrive at the actual surplus and the real value of the stock to the holder. It is liable to be varied by many contingencies, and the real estate is, I think, estimated too highly ; but it is conceded that there is a surplus, and it is very palpable that the assets can, properly managed, be made to yield a larger amount in the hands of the proper owner, than can be realized by a receiver compelled to close up the affairs without permission to exercise that discretion which an individual can exercise in his own concerns.

The judges in the first and second districts have agreed that a bank is clearly solvent which is clearly able to pay its debts, although it may have suspended specie payment for a time, and they say that this principle was held by this court and

the court of appeals, in the case of *The North American Trust & Banking Company*.

The courts in the first district have, as I understand, acted upon the principle thus put forth, and have refused to appoint receivers, and have discharged receivers already appointed, when it has appeared that the bank was clearly solvent, that is, was of abundant ability to pay its debts notwithstanding it has succumbed to the pressure of the times. I think I ought to follow the precedent unless there are good objections existing in the case. 1st. If the bank can resume its business and assume the control and settlement of its own affairs, it will be in a situation to realize a greater amount of its assets than can well be done by a third person.

2d. The creditors will be rather benefited than harmed by the dissolution of the injunction and the discharge of the receiver. Their debts, which must now await the tardy settlement by process of law, may be demanded and collected at once.

3d. The billholder loses no security, and can at once take measures to compel their immediate redemption.

4th. The public cannot suffer except by consent; the bills will continue to be secure, so long as the securities remain in the banking department, and these securities must remain until the bills are withdrawn from circulation. No person can be compelled to deposit with, or in any other manner give credit to the bank, and whatever credit it has, it must earn or acquire by the character which the managers may give the institution. It will resume business with the discredit of these proceedings, which is to be overcome before a very general credit can be established.

Some of the stockholders object to the granting of this application, upon the ground that they prefer the closing up of the affairs of the bank to further risking their money and their credit in the business in which they voluntarily embarked with their associates. I think that none but the plaintiff is entitled to be heard upon this application, as he is the only party to the suit. But if all who are represented, or claim to

be represented, are entitled to a hearing, they represent but a small part of the stock, and whether they represent much or little, their objections can only avail when resting upon some statute or upon some legal right. If the bank is not insolvent or in danger of insolvency, they cannot insist upon the dissolution of the association.

They have voluntarily engaged in the business of banking, and can only withdraw in the mode prescribed by law and the articles of association, and while the bank has an existence, it must be managed by directors chosen according to law. Much was said of the character of the managers into whose hands the bank has come. If facts had been stated in the affidavits showing their incompetency and unfitness to manage an institution of this kind, it might legitimately have influenced me perhaps in my conclusion as to the probable ability of the bank to recover with its present resources and successfully prosecute its business. But no facts are stated, and general denunciations and sweeping charges cannot be permitted to control judicial action. If my own opinion of the gentlemen who are obnoxious to those opposing this motion, was in accord with the objections, if not based upon facts brought judicially before me, it could not properly influence me in the decision of the motion.

Perhaps all are sufficiently answered by the fact that they whose right it was, have certified to their fitness by selecting them as the guardians and trustees of their property. Aside from the merits of the application, two objections are taken by the plaintiff. 1st. That the defendant is in contempt for a violation of the injunction, and therefore cannot be heard upon a motion addressed to the favor of the court.

The breach alleged, is, the election of directors and the organization of the new board pending the proceedings. But the injunction is upon the defendant and its officers, restraining them from exercising any of its corporate rights, privileges or franchises. The stockholders were not enjoined from doing any act, and the individual act of the stockholders in selecting directors or appointing agents to care for their property, was

in no sense a corporate act by the association, or its officers or agents. There was no breach of the injunction.

The second objection was, that the court had not the power to discharge a receivership which it had once created. But for the character of the counsel and the earnestness and apparent sincerity with which this objection was put forth, I should not have considered it a very serious question.

The counsel view the jurisdiction of the court in regard to insolvent corporations as a special jurisdiction, and the proceeding a statutory proceeding, and in character like the jurisdiction vested in the supreme court in the New-York street cases. But I regard it rather as an extension of the general jurisdiction of the court, to be exercised subject to the provisions of the statute, in the same manner and subject to the same control as other matters within the jurisdiction proper of the court. There is nothing in the nature of the power vested in the court, why it should be different, and any other conclusion would lead to absurdities.

If the position of the counsel is correct, then every step taken in a proceeding is final. An injunction once granted, cannot be dissolved; an irregularity or defect in the proceeding cannot be amended or disregarded, and if in the result of the action it appears that the corporation is clearly solvent, the receiver must, nevertheless, wind up the affairs and give the stockholders the surplus. I do not see how, if the objection is well taken, the court could interfere upon motion, even for fraud. This, however, the counsel conceded could be done, and yet if it was really an act done under a special power, I do not see why the aggrieved party would not be driven to an action, as he would be to get rid of any act *in pais* on a fraudulent deed.

The practice in New-York has been to control and set aside orders of this kind in these proceedings as in ordinary actions. In *Verplank agt. The Mercantile Insurance Co.*, (2 Paige, 488,) the chancellor evidently contemplates an alteration or revocation of the power of a receiver as within the province of the court. In the case of *The Bank of Buffalo*, (6 Paige, 497,) the

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court did not suppose that it was acting under a special statutory power to be strictly observed, and that when once executed its power over the proceedings was gone.

It did dissolve the injunction, and the granting of the injunction is as much the exercise of the special power as the appointing of the receiver. The proceedings in these cases were by petition, and the order for a receiver when made, was necessarily final, as the proceedings were summary. The order was in the nature of a decree, and to be enrolled as a final decree. The chancellor, in his opinion, recognizes the distinction between an interlocutory order and a final order or decree in proceedings against corporations. He says: "A final order or decree for the appointment of a receiver, is a virtual dissolution of the corporation." So in the matter of *The City Bank of Buffalo*, (10 Paige, 378,) a final order had been made in the action, and upon that ground the chancellor held that there was no necessity to review the action. The cause had been brought to a hearing, and a final decree made therein, adjudging that the bank had forfeited its rights, &c. In this case, no final judgment or order has been given. 1st. The general term could not give judgment in the case. That could only be done at special term. (*Code*, § 278.) 2d. The defendant had twenty days to answer the complaint, from the time of service, and had not waived that right by consenting that judgment might be taken. The interlocutory order did not affect the right to answer, or the necessity of a final judgment in the action.

The plaintiff claims to be a creditor of the defendant as one of the firm of Richwall & Ferry. The action is not prosecuted by him as a creditor, and he is not, therefore, entitled to any relief as such, but inasmuch as he fears that he may be delayed in the collection of his debt if the bank is restored to the control of the present directors, provision will be made in the order for a speedy trial of his claim.

The motion will be granted, and the defendant have leave to answer the complaint within twenty days, on payment of \$10 costs of this motion; the receiver to pass his accounts be-

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fore O. S. Williams, Esq., referee, to retain such compensation for his services and for expenses incurred, as shall be allowed by said referee; this order not to abate any suit brought by the receiver, but the receivership continued as to the demands in suit, until the bank can be substituted in the place of the receiver as plaintiff. In case the plaintiff elects to discontinue this action, then the defendant to pay the costs and reasonable counsel fee of the plaintiff, to be certified by the referee aforesaid, and the defendant is to stipulate to answer any complaint which shall be made upon it at the suit of Rockwell & Ferry, for the recovery of their claim within twenty days after the service thereof, and to refer the action to the said referee for trial and decision.

SUPREME COURT.

GEORGE WAIT agt. MARIUS SCHOONMAKER.

A sheriff may, under the statute, demand his fees for service of a summons and complaint, previous to the service thereof; but if he serves them without prepayment, he cannot retain them, and refuse to make a return, because his fees are not paid.

Albany Special Term, January, 1858.

MOTION for attachment against the sheriff of Ulster for not returning a summons and complaint forwarded to him for service. The papers were served prior to November 28th, 1857, without demanding prepayment of fees. On that day the sheriff wrote to the plaintiff's attorney, that the papers were served, and that on receipt of \$1.25 for his fees and postage, he would return the papers. The plaintiff's attorney did not do so, and on the 12th of January, 1858, served on the sheriff, a notice to return the papers to him at his office in Albany within ten days, or show cause at the next

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special term, at Albany, why an attachment should not issue against him. The sheriff now appears and shows for cause against the attachment, that his fees for service of the papers have not been paid, and that such is the uniform custom of his office, adopted under legal advice.

JOHN I. BURTON, *for plaintiff*.

F. L. WESTBROOK, *for sheriff*.

HOGEBROOM, Justice. Sheriffs, when required to serve summonses and complaints, and certain other papers, are entitled to demand payment of their fees previous to such service. (2 *Rev. Stat.* 651; *Code*, § 419.) But in this case, the sheriff performed the service without demanding prepayment of his fees. He cannot, therefore, refuse to *return* the papers for that reason, especially as he does not allege the non-payment of his fees for making a return as an excuse for not complying with the notice, and does not show how much his fees were on that account. Having waived the right of prepayment, he must make a proper return of the papers served. As the question is new, and his practice was adopted on legal advice, and he swears to good faith, and the plaintiff's attorney appears not to have paid the fees, though notified in November last, I shall not impose costs on the sheriff, and shall give him ten days after notice of the order, to return the papers, in default of which an attachment may issue. Let such an order be entered.

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SUPERIOR COURT.

THOMAS MCSPEDON and CHARLES W. BAKER agt. THE MAYOR, ALDERMEN and COMMONALTY of the city of New-York.

On the 16th day of December, 1853, a resolution was passed and approved by the common council of the city of New-York, that the clerk of the common council be and he was thereby authorized and directed to cause to be printed and bound, 1,500 copies of the city charter and Kent's notes, at an expense not to exceed the amount theretofore paid therefor, the same to include all the amendments to the date of the resolution.

Under this resolution, the clerk employed the plaintiffs to do the work, which amounted to \$3,000, and for which this action was brought.

The question was, whether this work did not come under the provisions of the act of 1853, § 12, which requires all work to be done, and supplies to be furnished for the corporation, involving an expenditure of more than \$250, to be by contract founded on sealed bids, or on proposals made in compliance with public notice, &c.?

Held, that the corporation has now power to take the entire control of its ordinary daily printing, such as the printing of its minutes, ordinances, resolutions, reports of committees, &c., without referring the subject to any executive department. Such description of work does not seem properly to fall within the provision of section 12 of the act of 1853, which rather contemplates single and independent transactions, involving, as a whole, a certain amount of expenditure.

The work in question, however, was not of that ordinary kind above referred to. It embraced one single job, at an exact ascertained price, and though it involved "printing," it was not the ordinary printing done for the common council. And the work involving, as it necessarily did, the expenditure of over \$250, could only be done by contract in the way prescribed in the 12th section of the act of 1853. Complaint dismissed with costs.

Special Term, December, 1857.

THIS action is brought to recover three thousand dollars, the value of work done by plaintiffs for defendants, on the employment of the clerk of the common council, who, by resolution of the board, passed and approved on the 16th day of December, 1853, was directed and authorized to cause one thousand five hundred copies of the city charter with Kent's

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notes, to be printed and bound, at an expense not to exceed the amount theretofore paid for the same.

The complaint alleges that the work was done pursuant to the employment, and that the volumes were delivered to the defendants, who accepted and received the same as printed and bound, in compliance with their said resolution and direction. It then avers, that by resolution passed and approved on the 18th day of June, 1855, the defendants authorized the comptroller to pay the bill of plaintiffs, and which the clerk had certified to be correct.

The complaint also contains common counts for work and labor, goods and materials.

The answer admits both the resolutions of the 16th day of December, 1853, and 18th day of June, 1855, but alleges that they are in violation of the 12th section of the act of the 12th of April, 1853, to amend the city charter, and not binding on defendants, and that defendants are not liable for the work done under them.

There is no dispute about the facts.

The plaintiffs were originally employed to do the printing for the corporation, for one year, under a contract entered into between them and the defendants, dated the 3d day of July, 1848, in respect to which no objection is made.

This contract expired, by its own limitation, on the 3d day of July, 1849.

Before this period had arrived, the charter of 1849 was adopted, and on the 30th day of May, 1849, the ordinance organizing the departments of the municipal government under that charter, was passed.

By section 507 of that ordinance, it was declared, that until the common council should otherwise provide by ordinance, the ordinances and resolutions then in force should be applicable to the public printing; but to enable the common council to revise the same, and to make such provisions in respect thereto, as the public interest might require; the comptroller and counsel of the corporation were directed to make a report upon said ordinances to the common council, on or before the

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1st day of July following, (1849,) with the draft of an ordinance adapted to carry the same into effect. No such report appears to have been made.

The plaintiff's contract having expired, they continued to do the printing under the terms and provisions of the old contract, and from that time to the present, all the printing of the common council has been sent to the plaintiffs, and regularly performed by them.

At each meeting of the common council since that period, their proceedings, and the documents and papers directed to be printed, have been furnished, printed by the plaintiffs, at the rates of charge embraced in their original contract, and have, at all times, been regularly paid by the comptroller without objection, except in the present instance.

On the 7th day of September, 1850, a resolution was passed directing the clerk of the common council to cause to be published 500 copies of Kent's charter and notes, and the amended charter of 1849, and \$1,000 was appropriated to defray the expense thereof.

On the 20th day of April, 1852, 250 additional copies were, by resolution of that date, directed to be printed for the use of the city.

The act of 1853, amending the charter, went into effect on the 12th day of April of that year.

On the 16th day of December, 1853, a resolution was passed and approved, that the clerk of the common council be, and he was thereby authorized and directed to cause to be printed and bound 1,500 copies of the city charter and Kent's notes, at an expense not to exceed the amount theretofore paid therefor, the same to include all the amendments to the date of the resolution.

It was under this resolution that the clerk employed the plaintiffs to do the work for which this action is brought.

On the 26th day of December, 1853, a communication was addressed by the comptroller to the common council, and presented to the board of aldermen on the 28th of that month,

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relative to the public printing. It was referred to the finance committee, but no report was made thereon.

On the 7th day of August, 1854, a preamble and resolution was presented to the board of councilmen, intended to provide for new contracts for printing, but the same were, on the 13th day of September of that year, amended by the adoption of the following resolution :

" *Resolved*, That this board (the board of councilmen) is entirely satisfied with the existing contract with Messrs. McSpedon & Baker, in printing for the legislative branch of the corporation ; and Collins, Bowne & Co., in printing for the heads of departments of this city, and accordingly recommend that the same be continued as heretofore."

On the 18th day of June, 1855, the common council, by resolution approved by the mayor on that day, directed the comptroller to pay the plaintiff's bill for the work done under the resolution of December the 16th, 1853, (the work now sued for.)

The bill had been presented February the 27th, 1855, and payment refused by the comptroller.

It is admitted that this work was not advertised for.

JOHN W. EDMONDS, *for plaintiffs*.

A. R. LAWRENCE, JR., *for defendants*.

SLOSSON, Justice. By the act to amend the charter of the city, passed April the 2d, 1849, the legislative power of the corporation is continued in the board of aldermen and board of assistants, together forming the common council, while the whole executive power is vested in the mayor, the heads of departments, and such other executive officers as should be from time to time created by law ; and it is expressly provided, that " neither the common council, nor any committee or member thereof, shall perform any executive business whatever, except such as is or shall be especially imposed on them by the law of the state, and excepting also the power to approve or reject nominations. (§§ 1 and 9, act of 1849.)

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It is also provided by said act, that "all contracts to be made or let by authority of the common council for work to be done, or supplies to be furnished, &c., shall be made by the appropriate heads of departments, under such regulations as shall be established by ordinances of the common council." (§ 23.)

It also provided, (§ 21,) "that the several executive departments, and the officers and clerks thereof, shall be subject to the legislative regulation and direction of the common council, (so far as the same shall not be inconsistent with the act,) and the duties thereof shall be performed in accordance with the charter, and laws and ordinances of the city."

These provisions are undisturbed by the "act further to amend the charter of the city," passed April the 17th, 1853, except that by this latter act a board of councilmen is substituted for that of the assistants.

By the act of 1853, it is provided, (§ 12,) "that all work to be done, and all supplies to be furnished for the corporation, involving an expenditure of more than \$250, shall be by contract, founded on sealed bids, or on proposals made in compliance with public notice for the full period of ten days, and all such contracts, when given, shall be given to the lowest bidder, with adequate security. All such bids or proposals shall be opened by the heads of departments advertising for them in presence of the comptroller, and such of the parties making them as may desire to be present."

In May, 1849, the common council passed a general ordinance, organizing the departments of the municipal government, and prescribing their powers and duties.

I have not been referred to any ordinance of the corporation, nor do I find any provision in the general ordinance of May, 1849, by which work of the description of that in question is referred to, or made the subject of cognizance of any one department; on the contrary, the subject of "printing," is carefully excluded from all the enactments of the general ordinance, and the common council seems to have retained it especially under its own cognizance.

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The powers and duties of the department of repairs and supplies, as defined by the act of 1849, (§ 13,) are the taking "cognizance of all repairs and supplies of and for roads and avenues, public pavements, repairs to public buildings, to fire engines, and apparatus of fire department."

By section 237, of the ordinance, the duties of the department of repairs and supplies are defined to be (following, substantially, the statute of 1849) the making and repairing the public roads, constructing and repairing public buildings, wells and pumps, supplying the public rooms and offices of the corporation, the court rooms, &c., *with fuel, and all other things necessary therefor, except stationery*, regulating streets, &c.; and in the department is created the bureau of public buildings, to which is referred the supplying the public rooms and offices of the corporation, the court rooms, &c., with fuel, and *all other things necessary therefor, except stationery*.

By section 243, the "chief officer of this department is required to advertise for estimates, and make contracts for the several services and supplies, enumerated as falling within the province of his department, and for all *other work and supplies which may be directed* by the common council to be done or furnished, under the supervision of his department.

These provisions, it will be perceived, do not embrace work of the description of that in controversy, but it is quite manifest from the last clause of section 243, that the common council evidently considered themselves at liberty to refer to this department the subject of other work and supplies than those specially enumerated in the statute and ordinances as properly or peculiarly cognizable by it.

Title 3, of the general ordinance, regulates the subject of "contracts for supplies and work for the corporation." It requires that all supplies to be furnished, or work done for the corporation, shall be furnished or performed by contract, *except for printing*. Such contracts are to be made by the heads of departments under whose direction the supplies are to be furnished or the work performed, except contracts for stationery, which are to be made by the comptroller.

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It is thus quite obvious, that neither under the act of 1849, nor under the general ordinance to carry its provisions into effect, is provision made for the performance of the peculiar kind of work for the value of which this suit is instituted.

What then are the powers of the corporation in respect to it?

The power to order and direct, in other words to contract, for the performance of such ministerial service as is necessary to the proper and convenient performance of its appropriate duties, is a power necessarily inherent in the common council, as it is in every other similar body, and has always belonged to it, unless it is taken away by some of the provisions of the acts of 1849, 1853, or some ordinance yet in force to carry out these provisions.

That the corporation has now power to take the entire control of its ordinary daily printing, such as the printing of its minutes, ordinances, resolutions, reports of committees, &c., without referring the subject to any executive department, will not probably be disputed. Such description of work does not seem properly to fall within the provision of section 12 of the act of 1853, which rather contemplates single and independent transactions, involving, as a whole, a certain amount of expenditure.

The work in question, however, is not of that ordinary kind to which I have referred. It embraces one single job, at an exact ascertained price, and though it involves "printing," it is not the ordinary printing done for the common council. Even if it be included within the meaning of the word "printing," as used in title 3, of the general ordinance above quoted, by which that description of work is excluded from the regulations in respect to contracts, it does not follow that the common council *may lawfully* make contracts themselves in respect to it. If the provisions of section 12 of the act of 1853, are to be taken in an unlimited, imperative sense, then this work, involving, as it necessarily did, the expenditure of over \$250, could only be done by contract in the way prescribed in such section.

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I think it quite clear, from the provisions of the acts of 1849 and 1853, that it was the intention of the legislature wholly to separate the executive from the legislative powers of the city government, and to debar the two boards constituting the common council from the independent exercise of all executive power, at least of that description which involves the expenditure of money beyond a certain amount, always excepting such as is or may be specially imposed on them by law, and excepting the power of opposing or rejecting nominations, as provided in sections 1 and 9 of the act of 1849.

The common council, in its legislative capacity, has the power to regulate the performance of the duties of the executive departments, and probably to assign to them duties not specially enumerated in the statutes, but of the same general character; but to make contracts in respect to work to be done, or supplies furnished of any description, involving an expenditure of over \$250, is not within their power or capacity to do. It is no answer to say that they have not made any regulation on the subject by ordinance.

They have the power to do it, and it was perfectly competent to them to have referred the subject, for the purpose of the contract, to the department of repairs and supplies. The right of the common council to order the work to be done, cannot be disputed, but it could only properly be done by contract, in the manner pointed out in section 12 of the act of 1853.

The object of that section was not only to confine the subject of contract making to the heads of departments, but to secure competition and cheapness in the ministerial service of the city government.

To hold that work of the description of that now in question might properly be directed to be done without contract, would be to establish a doctrine subversive in my judgment, of the provisions of section 12, and contrary to its true meaning and spirit.

I must hold, therefore, that this work was done without proper authority.

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If the common council could not properly contract for it themselves by mere resolution or ordinance, they could not depute the power to their clerk, nor could they ratify his act by accepting the work.

The plaintiff's right of action, therefore, fails, and judgment must be given for the defendants.

Complaint dismissed, with costs.

SUPREME COURT.

DANIEL D. CONOVER agt. CHARLES DEVLIN.

A return to a writ of *certiorari* may be made by a justice of this court, and is valid, although his official term has expired. And this is so, although the writ is served after the judge has gone out of office. (*As a decision on the point in the same way, see Harris agt. Whitney, 6 How. Pr. R. 175.*)

In a proceeding in this case, under the statute for the delivery of the books and papers to the plaintiff Conover, who claimed the office of street commissioner, the judge who then presided, came to the conclusion that Conover was entitled to the possession thereof, (and ordered a delivery to him as street commissioner *de facto*,) on the ground that he had been in the possession of the rooms where the business of the office was usually transacted, a part of two days, claiming a right to such possession, and to perform the duties of the office, and actually performing an official act, under color of an appointment by the governor. But at the same time admitting that subsequent to Conover's removal, and prior to the proceedings before the judge, Devlin, the defendant, entered the same official rooms, and took possession of the books and papers, under color of an appointment by the mayor, with the consent of the board of aldermen, and then had possession, and claimed a right to the possession of such books and papers, and to the office, under the appointment by the mayor.

Held, that on these facts, it was error to make an order for the delivery of the books and papers to Conover, on the ground alone that he was street commissioner *de facto*, without an examination or determination as to his title *de jure*. Although it was not a proceeding instituted for the purpose of examining or determining the right or title to the office as between Conover and Devlin, or the question whether the governor or the mayor had the legal right to fill the vacancy, nor could any decision or order made in it, settle the right or title of that question;

Held, nevertheless, that when it appeared before the judge in that proceeding, that

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there were two claimants to the office, and of the books and papers, under antagonistic appointments, he chose, instead of dismissing the proceedings on the ground that Conover's title to the office was not clear and free from reasonable doubt, to proceed and decide that Conover had a right to the possession of the books and papers, and order their delivery to him, he could not on any principle or precedent so decide and order, without an express adjudication for the purpose of that proceeding, that the governor had the right to make the appointment, not the mayor; and that Conover was entitled to the office *de jure*. Besides, upon the facts stated, which was the officer *de facto*? At the time of the proceedings before the judge, the circumstances did not permit either Conover or Devlin to be recognized in law as officers *de facto*, because those circumstances had not permitted either of them, as against the other, to acquire the reputation of being the rightful and legal street commissioner; there then being an open and notorious contest between them for the possession of the books and papers, &c., nor had the claims of either, as against the other, been acquiesced in by the public, so as to call upon the law to call either of them the street commissioner *de facto*, for the protection of the public. It was a simple question of law, who had the appointment—the governor or mayor and aldermen.

New-York Special Term, 1858.

MOTION for a certiorari.

SUTHERLAND, Justice. Mr. JAMES T. BRADY, on behalf of Charles Devlin, moves for a *certiorari*, to be directed to the Hon. CHARLES A. PEABODY, late one of the justices of this court, directing him to certify to this court the proceedings had before him in this matter, and the record thereof, together with the testimony taken before him, and the orders made by him, and his decisions and acts in such proceedings, that the same may be reviewed by this court.

The motion is founded on the verified petition of Charles Devlin, setting forth such proceedings, &c. Mr. D. D. FIELD, on behalf of Mr. Conover, appears and opposes the motion on the ground, and only on the ground, that Mr. Peabody's term of office having expired, the *certiorari* cannot go to him; and if the writ were issued, being out of office, his return thereto would be a nullity; citing and relying on the decision of Judge HARRIS, in *Peck agt. Foot and wife*, (4 Howard, Pr. R. 425.) This case is certainly in point; and if it contains a correct ex-

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position of the law, must be held conclusive against this motion.

But as I could not see how the fact of an officer going out of office could operate as a correction of his errors while in office; and as it might be quite important for the party complaining of such errors to have them corrected, notwithstanding the officer might never have a chance to repeat them, I have been led to look further for the law on this point. In *Harris and others agt. Whitney and others*, (6 *Howard Pr. R.* 175,) decided at the Chenango general term, 1851, (MASON, SHANKLAND and MONSON, *Justices*,) this case of *Peck agt. Foot* was fully considered, and the court were unanimous in the opinion that the case was wrongly decided, and ought not to be followed. It is true, that in *Peck agt. Foot*, the *certiorari* was served on the judge before he went out of office; and in *Harris and others agt. Whitney and others*, the writ was served on the judges *after* they went out of office; yet as Judge HARRIS put his decision on the ground, that the "return must be an *official* act, performed under the sanction of an *official* oath," and that as the return, having been made by a "mere private citizen, wholly divested of the official power and responsibility with which he had been clothed while in office," must be regarded as a mere nullity—it is clear that his decision was directly overruled in *Harris agt. Whitney*. In *Bacon's Abr. Certiorari F.*, it is said: "If the person who ought to certify a record—as a justice of the peace, who hath taken a recognizance; or a judge of *nisi prius*, who hath taken a verdict; or a coroner, who hath taken an inquest—die with the record in his custody, the *certiorari* may go to his executor," citing, 2 *Keb.* 750; *Cro. Jac.* 669; *Dyer*, 163; *Rast. Ent.* 439; 2 *Inst.* 424; 2 *Roll. Abr.* 629. In *Welch agt. Jay*, (13 *Pickering R.* 477, 481, 488,) it was held, that at common law, a valid return could be made by a public officer after the expiration of his term of office. (See also *Clerke agt. Wilkins*, 1 *Salk. R.* 322; *The King agt. The Sheriff of Middlesex*, 4 *East R.* 604.)

There is no doubt, therefore, if the *certiorari* applied for in

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this case should issue, that Judge PEABODY could make a valid return to it, and such a return as this court could act upon and review, although his official term has expired ; and I think it equally clear that it would be his duty to make a return. Although I have thus disposed of the only objection to the allowance of the writ made before me by the counsel of Mr. Conover ; yet, as the writ of *certiorari* is not a writ of right, but a writ to be granted or refused in the sound discretion of the court, and as it has been frequently refused, where it was clear there had been no error, or where great public inconvenience might ensue from its being issued, I have looked into the proceedings before Judge PEABODY with reference to these considerations.

I do not see how the public can be injured by a review of these proceedings. The public are certainly interested in having the question which of the two is street commissioner, Mr. Conover or Mr. Devlin, finally settled in a legitimate way, in the proceeding by *quo warranto* already instituted for that purpose, as soon as possible ; but until the right and title to the office shall be so settled, I cannot say that it will make any difference to the public which exercises the duties of the office or has the possession of the books and papers belonging to the office.

Upon the point whether it is probable there was any error in the proceedings before Judge PEABODY, I have looked not only into the petition of Mr. Devlin, upon which the motion is made, purporting to set forth such proceedings, but also into the report of the case, (24 Barb. 588,) for the grounds upon which the learned judge put his decision and made the order for the delivery of the books and papers to Mr. Conover.

In his opinion, after stating the facts to be : that Joseph S. Taylor, the late incumbent of the office, was elected in November, 1855, for the term of three years from the 1st of January, 1856 ; that he entered and continued in office until June 9th, 1857, when he died ; that on the 12th day of June, Mr. Conover was appointed by the governor to fill the place, and on the 13th of June, took the oath of office required by law, and

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filed it with the proper officer ; and also on the same day executed and filed with the proper officer, an official bond, with two sureties, in the penal sum of ten thousand dollars ; that he then proceeded to the rooms belonging to the city, occupied as the office or place of business of the street commissioner, entered them, claimed that he was street commissioner, exhibited his commission to the employees, asserted authority over them and the business of the office, and locating himself at a desk, offered to perform, and did *in one instance* at least, *perform* official business as street commissioner, remaining there, claiming to be in possession of the place and business by virtue of his office, until the usual hour of closing the place for the day, when he left, as the place was closed ; that he returned the next day, resumed his place and official position, and remained some time there at his desk at the place properly occupied by the head of the department, as he claimed to be ; that in the course of the day he was forcibly removed from the rooms ; that the next day he returned, and was again removed by the same person ; that the deputy street commissioner, rightfully in possession of the books and papers, and in charge of the business while the vacancy in the office continued, refused throughout the time of the applicant's (Mr. Conover's) presence in the office, to recognize his claims to official character, and withheld from him the actual manual control of the books and papers belonging to the office ; that on the 16th of June, after Mr. Conover's last removal from the premises, Mr. Devlin having received the appointment of the mayor, with the consent of the board of aldermen, filed in the proper place his official oath and bond, duly approved, entered the rooms, and took possession of the books and papers, claiming to be the street commissioner, by virtue of his appointment, and thence hitherto had continued, and that upon these facts, Mr. Conover had demanded an order and warrant by which he should be put in possession of the books and papers. The learned judge then proceeds, and states the reasons and grounds upon which he had come to the conclusion, that

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Mr. Conover was entitled to the possession of the books and papers, and to the order for their delivery to him.

If I do not entirely misapprehend this opinion, his reasoning is briefly this:—That although the only question to be decided on the application of Mr. Conover under the provisions of the statute, was whether he was the successor to the office of street commissioner; yet, that neither Conover's title to the office under the appointment of the governor, nor Devlin's title under the appointment of the mayor, could be examined or inquired into in that proceeding, further than to see whether, if Conover was in possession of the office, he had color of title; and then, holding, on the facts as previously stated, that Conover *was* in the possession of the office of street commissioner, under color of title, when forcibly removed from the rooms used as the street commissioner's place of business; there being no pretence that he had forfeited or *resigned* any right he had thus acquired by his possession, under color, &c.; that he was then street commissioner *de facto*, and *as such* was entitled to the books and papers, without an examination of, or passing upon the title *de jure* of either Conover or Devlin, under their respective antagonistic appointments; holding that such examination of their respective titles *de jure*, could only be had in a direct action or proceeding by *quo warranto* for that purpose;—thus coming to the conclusion, that Conover was entitled to the possession of the books and papers, and making an order for their delivery to him, on the ground that he had been in the possession of the rooms where the business of the office was usually transacted, a part of two days, claiming a right to such possession, and to perform the duties of the office, and actually performing one official act, under color of an appointment by the governor; at the same time admitting that subsequent to Conover's removal, and on the 16th of June, Devlin entered the same official rooms, and took possession of the books and papers, under color of an appointment by the mayor, with the consent of the board of aldermen, and then had possession of the books and papers, claiming a right to

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such books and papers, and to the office, under the appointment by the mayor.

Now it appears to me, that on these facts, nothing could be more erroneous, or farther outside of the remedy intended by the provisions of the statute, than to make the order for the delivery of the books and papers to Conover, on the ground alone that he was street commissioner *de facto*, without any examination or determination as to his title *de jure*.

True, it was not a proceeding instituted for the purpose of examining or determining the right or title to the office as between Conover and Devlin; or the question whether the governor or the mayor, had the legal right to fill the vacancy, nor could any decision or order made in it, settle the right or title of that question; yet, it is nevertheless true, that when it appeared before him in that proceeding, that there were two claimants to the office, and of the books and papers, under antagonistic appointments; if Judge PEABODY, not deterred by the great interest which the public had in having the books and papers delivered to the right person, nor by any doubt thrown around the question of title, or of the right of appointment by the arguments of counsel, or by the notorious division of an intelligent public opinion upon the question; chose, instead of dismissing the proceedings on the ground that Conover's title to the office was not clear and free from reasonable doubt, to proceed and decide that Conover had a right to the possession of the books and papers, and order their delivery to him; he could not on any principle or precedent, so decide and order, without an express adjudication for the purpose of that proceeding, that the governor had the right to make the appointment, not the mayor; and that Conover was entitled to the office *de jure*.

If, on the facts, the learned judge was right in holding Conover to be the street commissioner *de facto*, he certainly was entirely mistaken as to the character and extent of the rights given him by law, as such *de facto* officer only. The distinction between an officer *de facto*, one *de jure*, and a mere usurper, is recognized by the law for the benefit of the public

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and of third persons, and of the officer only in suits where he is not a party. A person unquestioned, claiming, entering upon, and exercising the duties of an officer under the forms or color of an appointment, or of an election; or a person without even the color of an election or appointment, permitted by the government for a length of time, unquestioned, to perform the duties of an office, *acquires the reputation of being an officer in fact*, though he may not be an officer in point of law. The public and third persons cannot be supposed to know, or to investigate his title to the office, whether he has complied with the forms of law, taken the oath of office, filed a bond, &c.; or even, whether, if appointable, the governor or the mayor has the appointment. The public and third persons, in their dealings with each other, and with him as such acting officer, have, therefore, a right to act upon such reputation, and as to them, he is a good officer, whether he has a legal title to the office or not, so far as they are interested in his acts.

But the officer himself is bound to know whether he has a good title to the office; and if he undertakes to perform its duties without legal right, he does so at his peril.

Hence the rule of law, that the acts of an officer *de facto* are valid as to third persons who may be interested in his acts, though invalid as to himself. (*The People* agt. *Collins*, 7 *John*. 551; *McKinstry* agt. *Farmer*, 9 *John*. 185; *Wilcox* agt. *Smith*, 5 *Wend*. 234; *Plymouth* agt. *Painter*, 17 *Conn. R.* 585; *McGregor* agt. *Balch*, 14 *Vermont R.* 428; *Gilmore* agt. *Hall*, 4 *Pickering*, 257; *McKim* agt. *Somers*, 1 *Pennsylv. R.* 297; *Fowler* agt. *Beebe*, 9 *Mass. R.* 231; *Douglass* agt. *Wickmire*, 19 *Conn.* 489; *Green* agt. *Burke*, 23 *Wend*. 490.)

But this rule of law is established for the benefit of the public, not of the officer. It confers on him no rights, absolves him from no responsibility. If sued for money received by him under color of his office, it is no defence that he was only an officer *de facto*. (*United States* agt. *Maurice*, 2 *Brockenbrough U. S. C. C. R.* 96.) So, also, if an action is brought against him for malfeasance or misfeasance in office. (*Neal*

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agt. *The Overseers*, 5 *Watts R.* 539.) If he undertakes to recover by law the fees of his office or his salary, he must prove his legal title to the office, and to its fees or salary. (*Neal agt. The Overseers*, 5 *Watts R.* 539; *Biddle agt. The County Bank*, 7 *S. and R.* 392, &c.; *Plymouth agt. Painter*, 17 *Conn.* 585.)

If he undertakes to justify an official act complained of, he must aver and prove that he was legally an officer duly elected or appointed, and qualified to act. (*Green agt. Burke*, 23 *Wend.* 490; *Blake agt. Sturtevant*, 12 *N. H. R.* 567; *Cummings agt. Clarke*, 15 *Vermont R.* 653; *Colburn agt. Ellis*, 5 *Mass.* 427.)

It is clear, therefore, that independent of the express words of the provision of the statute under which these proceedings were had, which gives the remedy only to the successor, meaning of course the person legally appointed or elected, and qualified to take the office, and with it the books and papers belonging to it, that Mr. Conover was not entitled to the order for the delivery of the books and papers, upon the ground that he had shown that he was the street commissioner *de facto*, only, or without averring and proving that he had been legally appointed street commissioner and qualified. I have thus far assumed that the facts upon which the order was made showed Conover to be, as to third persons, an officer *de facto*. But is this so? On those facts, was either Conover or Devlin street commissioner *de facto*, at the time these proceedings were instituted before Judge PEABODY? What are the facts? On the 12th of June, Conover was appointed by the governor. On the 13th, he took the oath of office, and executed his official bond, and filed it. On the 16th of June, Devlin was appointed by the mayor, took the oath of office, and filed his official bond, duly approved. The proceedings before Judge PEABODY were commenced on the 19th of June. Conover had been in the rooms or place of the official business, for a part of two days, before the 16th of June, claiming a right to the office, and to the books and papers, and doing, as he claimed, one official act, he was then ousted. On the 16th of June, on Devlin's appointment by the mayor, he came into the same rooms, and took possession of the books and papers,

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and had them when the proceedings were commenced before Judge PEABODY, and held them until Judge PEABODY made his order, claiming to be the street commissioner. Thus, at most, at the time Conover made his application to Judge PEABODY, neither Conover or Devlin had been in possession of the rooms or official place of business, under claim and color of their respective appointments, or had performed the duties of the office for more than two or three days. There must be some color to the claim of right to the office; or without such color, a performance of official duties, and an acquiescence for a length of time that will raise a presumption of colorable right, to authorize a person to be recognized as an officer *de facto*. (*McGregor agt. Balch*, 14 *Vermont R.* 29; *Plymouth agt. Painter*, 17 *Conn.* 585; *Tucker agt. Aiken*, 7 *N. H. R.* 131; *Wilcox agt. Smith*, 5 *Wend.* 234.)

Now, at the time of these proceedings before Judge PEABODY, had either Conover or Devlin color of office, or had either exercised the functions of the office, so as to be recognized by the law as an officer *de facto*? One of them had the right and title to the office, and to the possession of the books and papers; which of them had this right, was the question. There cannot be two officers *de facto*, any more than two officers *de jure*, at the same time, to the same office. Which was the officer *de facto*? What became of the color of title of either, within the meaning of the phrase, as applied to officers *de facto*, when the one claimed under an appointment of the governor, and the other under an appointment of the mayor, the same office at the same time, an open and notorious contest having taken place between them for the official rooms, and books and papers, under their respective hostile appointments, from the time of their respective appointments?

One of them, and only one of them, had the *legal* right or title to the office or to the books and papers; which, was not then settled nor is it settled yet. At the time of the proceedings before Judge PEABODY, the circumstances did not permit either of them to be recognized in law as officers *de facto*, because those circumstances had not permitted either of them,

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as against the other, to acquire the reputation of being the rightful and legal street commissioner ; nor had the claims of either, as against the other, been acquiesced in by the public, so as to call upon the law to call either of them the street commissioner *de facto*, for the protection of the public.

It was a simple question of law who had the appointment, the governor or the mayor and aldermen ; and the nature of the question, and the open and notorious hostile contest which took place under their respective hostile appointments had not, at the time Judge PEABODY made his order in this matter for the delivery of the books and papers, given either of them a chance, as against the other, to acquire the reputation of being the legal officer, or to inspire public confidence in the one rather than in the other, as the real, legal street commissioner.

Unless, therefore, I should hold that Mr. Conover's title to the office, and to the possession of the books and papers, as shown in the proceedings before Judge PEABODY, was so clear and free from doubt that Judge PEABODY was at once justified in making the order for the delivery of the books and papers to him by Mr. Devlin, I ought to allow the writ of *certiorari* asked for, *on the ground* that there is probable cause for believing that there was error in those proceedings.

Certainly, if the order for the delivery of the books and papers could not legally have been made without passing upon the respective legal titles of the parties to the office ; a question of such magnitude and interest to the public and to the parties, and which has been so learnedly and ably discussed, not only in these proceedings, but in other legal proceedings, and which has not yet been decided ; I ought not to deny Mr. Devlin a right to review the proceedings in which that order was made.

I have shown, I think, that such order could not rightfully have been made without a clear, legal title in Conover to the office, and without an adjudication to that effect by Judge PEABODY, for the purposes of those proceedings.

The *certiorari* is allowed.

SUPERIOR COURT.

THOMAS PATON and others agt. CHARLES WRIGHT, STERLING LANIER, SYDNEY C. LANIER, PETER J. JOHNSON, THOMAS J. BRACE, GEORGE PETERSON, GEORGE L. HUMPHREY and others.

This is a complicated case, arising on a creditor's bill. The facts are fully set forth in the opinion, and from the whole case, substantially the following questions or propositions are decided :

1st. Where the answer of each member of a firm expressly states that the partnership had ceased, and was dissolved, (the answer being sworn to,) it amounts to an express agreement to dissolve, or to a declaration of a dissolution equivalent to one contained in articles.

2d. An assignment made and executed by one member of a firm, in the name of the firm, after dissolution, to a creditor of the firm, of assets in the hands of a third person, constituting the whole funds of the firm, to satisfy one creditor exclusively, is void and inoperative.

3d. The weight of authority appears to be, that a judgment obtained on an offer under § 385 of the Code, by one of a firm—joint debtors, binds the *joint property* so as to sweep it all away for the benefit of a single creditor and to defeat the rest ;

Held, that when this question comes fairly up for consideration in our higher tribunals, it will be seen whether it is possible to sustain the proposition so well asserted by Mr. Justice HARRIS, that a confession out of court is insufficient, and yet reconcile it with the proposition that a confession in court with this mockery of the form of an action, is perfectly valid.

4th. The plaintiffs having obtained a judgment in a regular action instituted against all the partners, in which, after the time for answering expired, having taken judgment against two of the firm duly served with process; the judgment binds the property of the firm, and a creditor's bill to reach joint property, may be filed upon it.

The fact that the plaintiffs proffered to use their legal rights for the benefit of the compromise creditors alone, added a recommendation of equity to their legal privileges.

5th. This court obtained the injunctions in a suit to which every one interested was a party, and in which the whole controversy could be decided at the trial. The pendency of suits in the supreme court to which the present plaintiffs were not parties, formed no objection to a decision here. The effect of that decision would be for the supreme court to determine. Injunction granted and receiver appointed.

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Special Term, January 30.

MOTION for an injunction and receiver.

J. E. BURRILL, JR., *for plaintiffs.*

ALBERT MATHEWS and CHARLES P. KIRKLAND, *for the defendants.*

MR. MATHEWS made the following points :

First. The motion invokes the discretion of the court, and seeks to enjoin three actions previously commenced, involving the questions sought to be put in issue in this action. This is unnecessary, and this court has decided it will not sanction or permit the practice. (*Grant agt. Quick*, 5 *Sand. R.* 612 ; *Code*, § 150, *as amended* 1852, *as to equitable defences.*)

I. The suit against the "Home Insurance Company," was commenced by Peterson & Humphrey, in this court, June 19th, 1854. The suit against the "Albany Mutual Ins. Company," was commenced in the supreme court by them, June 16th, 1854 ; and the suit against the "Williamsburgh Ins. Company," was commenced in the supreme court, June 16th, 1854 ; while this action was not commenced until July, 1854.

II. By order of this court in the action against the "Home Insurance Company," dated September 15th, 1854, and of the supreme court in the action against the "Albany Mutual Insurance Company," dated September 20th, 1854, on notice to the plaintiffs, they have been substituted as defendants in those actions, and the funds paid into the Life and Trust Company, to abide the order of the court.

III. The plaintiffs in this action may show affirmatively in these suits, if they can anywhere, that they are entitled to those funds.

IV. These facts show another action pending, and are a good plea in abatement to this action. (*Benderagle agt. Cocks*, 19 *Wend. R.* 207 ; *Groshen agt. Lyon*, 16 *Barb. S. C. R.* 461.)

V. The defendants Peterson & Humphrey, have chosen their tribunal and mode of trial, and this court will not interfere with that choice.

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VI. At least the court will enjoin no further than to prevent the payment of the money to defendants, and will let the suits proceed.

Second. The plaintiffs have no lien upon the funds in controversy to give them a footing in this court to claim equitable relief.

I. Their claim is disputed, and the judgment recovered by default against the defendants Johnson and Lanier, (clients of the plaintiff's attorney, without service of process upon Wright and Barr, who were present in the city and might have been served,) does not give them a right to reach equitable assets; they must first exhaust their legal remedies against the individual tangible property of Wright and Barr.

II. The claim of the plaintiffs, if any ever existed, was extinguished and cancelled by the compromise agreement they signed, and the acceptance of a dividend under it, and these defendants may impeach the alleged judgment of plaintiffs and set up this matter, for there is no judgment against Wright. (*Palmerston agt. Hufford*, 4 *Denio*, 166; *Oakley agt. Aspinwall*, 4 *Comst. R.* 513.)

III. The alleged transfer to Ellis, and the *parol trust* for the benefit of those who should come in and sign the compromise agreement, (*complaint, folio 17*.) were both void.

1st, For want of writing, and

2d, As being in violation of law as compulsory, and

3d, As contradicting written instruments, to wit: the powers of attorney. (2 *Rev. Stat. p.* 137, §§ 1, 2; *Grover agt. Wakeman*, 11 *Wend.* 187; *Cook agt. Eaton*, 16 *Barb. S. C. R.* 439.)

IV. The plaintiffs make no title to this alleged *parol trust* in themselves; they are *cestui que trusts* only. Besides, the trust was to begin only when the money was collected.

V. The sweeping allegations of fraud and collusion made in the complaint, are fully met and rebutted in the answer and affidavits. Besides, the plaintiffs have practiced the precise thing for which they blame the defendants.

VI. The attempt to engraft a *parol trust* upon the powers

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of attorney to Ellis, is also met by affidavits, and the other facts and circumstances of the case.

Third. The defendants Peterson & Humphrey make out a clear legal and equitable title to the policies of insurance by conveyance to them in payment of their debt, and this court ought not to interfere with their efforts to recover judgment for the amounts.

I. The assignment to Peterson & Humphrey, in payment of their demand, executed by Wright, was made before any dissolution of partnership in fact, (and at least before any notice of dissolution to Peterson & Humphrey,) and whether so or not, was a valid act and vested absolute title to not only Wright's one-eighth, but the whole insurance moneys, in Peterson & Humphrey. (*Egbert agt. Wood*, 3 *Paige R.* 517; *Story on Partnership*, 328; *Anderson agt. Tompkins*, 1 *Brock.* 456; *Harrison agt. Steeny*, 5 *Cranch*, 289; *Hitchcock agt. St. John*, 1 *Hoff. Chy. R.* 511; *Robinson agt. McCrowder*, 4 *McCord R.* 419; *McCulloch agt. Somerville*, 8 *Leigh*, 496; *Arnold agt. Brown*, 24 *Pick.* 89; *Darling agt. March*, 22 *Maine*, 184; *Morse agt. Bellows*, 7 *N. H.* 568; 6 *Cowen*, 442; 19 *Johns.* 143.)

II. The policies show the insurance was effected upon goods bought by Wright, Lanier & Co., of Peterson & Humphrey, and in their possession at the time of the insurance and fire, and were insured by way of indemnity, by an agreement between the parties, for the advantage of Peterson & Humphrey, and the funds in equity belong to and ought to be applied to payment of their claim. (*Carter agt. Rockett*, and cases cited, 8 *Paige*, 487.)

Fourth. Peterson & Humphrey are judgment creditors of the partnership, and if the conveyance to them were void, they stand in a better position and have a lien in equity upon those funds and are entitled to them, rather than the plaintiffs, who have compromised their claim and recovered only a fraudulent and collusive judgment upon a compromised and extinguished claim.

I. If the conveyance to Peterson & Humphrey is void, and if the plaintiffs are valid judgment creditors, the defendants are

also judgment creditors, and both being creditors of the partnership, the fund must be distributed rateably, and the court will not disturb the defendants except to equalize the distribution of the fund when recovered.

HOFFMAN, Justice. On the 4th of December, 1853, a policy of insurance was effected with the Southern Mutual Insurance Company, in the name of the firm of Wright, Lanier & Co.; another policy was effected on behalf of the same firm, on the 24th of December, 1853, with the Columbia Insurance Company, for the sum of \$2,500; and on the same day another with the Commercial Insurance Company, for \$2,500. It is sufficient to notice as to these policies of insurance, that they were placed by the firm in the hands of the late C. Ellis, by an assignment dated the 14th of January, 1854, to collect the amounts and to distribute the same among the creditors of such firm, which it is stated had been done to a considerable extent.

On the 24th of December, 1853, a policy was effected with the Williamsburgh City Fire Insurance Company, for the sum of \$5,000. On the same day, another policy was made with the Hamilton Fire Insurance Company of the city of New-York, for the sum of \$2,500, and another with the Mutual Insurance Company of Albany, in the sum of five thousand dollars.

By these policies, which are all similar in their provisions, the company insures "Wright, Lanier & Co.," against loss and damage by fire on hotel and household furniture of every description, including beds, bedding linen, china, glass, carpets, mirrors, &c., enumerating various articles of furniture contained in the brick and marble building, known as "The La Farge Hotel," in the city of New-York, in Broadway, &c.

On the 8th of January, the fire took place, which destroyed the hotel with the furniture.

On the 14th of January, a suit was commenced by the defendants Peterson & Humphrey, against the firm of "Wright Lanier & Co." Answers were put in on the 3d day of Febru-

ary, 1854, verified by all the members, denying the plaintiffs' cause of action; and in such answers, the dissolution of the firm on the 8th of January, the day of the fire, is stated; and it is averred, that since such day no partnership has existed between the parties or either of them; and the defendants and each of them state certain conditions of the sale; and Wright particularly, on his own knowledge, denies the agreement to give the notes, or any debt being due to Peterson & Humphrey.

As the notes agreed to be given by the firm to Peterson & Humphrey, as alleged, had not been given, a demand was made upon Wright to deliver the notes, which was refused, and thereupon a right of action arose, the result of which would be a recovery of a sum equivalent to the amount of the notes, less the interest for the period of their running.

From Mr. Sherwood's affidavit, it appears that he was employed by Wright to defend the suit on behalf of all the members of the firm, and appeared for them. This was about the 14th of January. Soon after the 19th of January, he addressed a note to each of the defendants, inquiring as to their defence, and this led to the employment by the other members of different attorneys.

On the 3d of February, a compromise agreement was entered into, by various creditors of the firm, whose demands amounted to \$63,700; whereby it was agreed to accept and receive from the said firm, (inclusive of what they might receive under the assignment of the three policies, placed in Ellis's hands in January,) thirty per cent. on the dollar of their indebtedness, in full satisfaction of their debts, on condition that the same should be paid without unreasonable delay, as soon as the proceeds of all the policies of insurance could be realized, and if any part of the amount of the policies could not be realized, then the residue of the thirty per cent. was to be paid in six months thereafter. The firm of Peterson & Humphrey, are the only creditors to any extent who have not signed such agreement.

On the 12th day of April, 1854, powers of attorney were executed in the name of the firm, and by all the members, em-

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powering Mr. Ellis to collect the amounts of the several policies respectively contained in them. The powers are in the general form, without directing anything as to the distribution of the proceeds. The three policies of insurance now in question, were delivered by some of the firm to Mr. Ellis. It is understood they were delivered to him previous, or at the time of the execution of the powers of attorney. It is stated that it was expressly understood and agreed by the parties, and each of them, that Ellis should collect the amounts, and apply the same in payment of the creditors who should execute the compromise agreement. On the 18th of May, 1854, an assignment was made in the name of the firm, but executed by Wright alone, to Peterson & Humphrey, transferring to them the three policies of insurance, to secure the amount of their demand against the firm.

This instrument recites the indebtedness of the firm, the ownership of the three policies of insurance, and transfers them and all the money due on them, or as far as might be necessary to be applied in payment and satisfaction of the said debt of the firm, without prejudice to any claim of Peterson & Humphrey, for any deficiency, in case enough was not realized from the said claims and demands.

The present plaintiff commenced an action on the 27th of May, 1854, and it appears by the judgment roll, that judgment was taken at the expiration of twenty days, upon an affidavit that no answer had been received. Process had been served personally upon Johnson and Sydney C. Lanier. Execution has been issued against the joint property of the firm, and the separate property of those served, and returned unsatisfied. The present complaint was sworn to on the 30th of June, 1854, and chiefly proceeds upon the ground of a creditor's bill, to reach these assets of the firm.

On the 15th of May, 1854, an action was commenced in the court of common pleas, on behalf of Peterson & Humphrey, against the firm. Service of the summons was made on the 14th of November, upon Charles Wright alone. An offer to take judgment was made by Wright on the same day, that the

plaintiffs might take judgment under the 385th section of the Code. This offer was accepted on the same day, and judgment entered on the 16th of December, 1854, the taxation of costs being waived.

These are the material facts upon which some of the most important questions in the case arise. Other facts bearing upon other points, will be hereafter noticed.

I consider it to be established that the firm became insolvent by the fire, and that it was dissolved and terminated at any rate by the 3d of February, 1854. The answer of each member of the firm, expressly stating that the partnership had ceased and was dissolved, (answers sworn to on that day,) amounts to an express agreement to dissolve, or to a declaration of a dissolution, equivalent to one contained in articles.

Again; it is in my opinion incontrovertible, that the policies in question comprised substantially the whole of the partnership property, then available for creditors and not before appropriated. Under such circumstances, I consider the assignment of the 18th of May, made by Wright alone, to be void and inoperative. The case of *Hitchcock agt. St. John*, (1 *Hoffman's Rep.*), and the authorities adverted to, apply to a specific transfer and delivery of a parcel of goods, or particular piece of property, in payment of a debt. They have no application to a case of assignment of assets in the hands of another, constituting the whole funds of a firm, and to satisfy one creditor exclusively. Besides, I am inclined to think that as to transfers after an actual dissolution, the language in *Hitchcock agt. St. John*, is too broad.

In *Kemp agt. Carnly*, (December term, 1854,) this court at general term, reviewed its previous decisions, and held the law to be that one partner could not execute an assignment of all the partnership property, and appoint an assignee, even providing for a rateable distribution of the funds, when his associates are present and capable of acting. An assignment giving preferences would, of course, be more objectionable, and this was the decision in *Hitchcock agt. St. John*, even although the partner who did not join, was in Savannah.

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Again ; the intended transfer was not in full discharge of the debt, but a claim for any deficiency is expressly reserved.

In addition to this, the present assignment was in direct contradiction to the will of the other partners, and in violation of their known desire ; for they had put in answers, contesting under oath the right and claim of the assignees. Nay, more, they admit the policies had been placed in the hands of Mr. Ellis for the purpose of fulfilling the compromise agreement made in April, 1854, and as I understand their position on the record, they reiterated their opposition.

In my opinion, the argument which Mr. Mathews has forcibly presented, is untenable ; I consider that it has never yet been decided that one partner after insolvency and dissolution, can transfer to one creditor the whole, or substantially the whole of the partnership property, to save him and exclude all others.

In relation to the claims of Peterson & Humphrey, founded upon the judgment entered on the offer of Wright, and its acceptance in November, 1854, a few words will suffice.

The exposition by the venerable Judge CADY, of the 385th section of the Code, and his remarks upon its similarity to the former "*cognovit actionem*," and as capable of being equally abused, are in my opinion, sound and just. (*Mann agt. Savage*, 7 *Howard*, 456.) The weight of authority seems unfortunately to show the law to be, that a judgment obtained on such an offer by one of two joint debtors, binds the joint property, so as to sweep it all away for the benefit of a single creditor, and to defeat the rest. (*Olwell agt. McLaughlin*, 10 *Leg. Obs.* 316 ; *Emery agt. Emery* 9 *Howard*, 180 ; *Code*, § 136, *Sub.* 1 ; *Pardee agt. Haynes* 10 *Wendell*, 630 ; *Stoutenburgh agt. Valkenburgh*, 7 *Howard*, 230 ; *Lipmeier agt. Joelson*, 1 *Code Rep. N. S.* 161, *n.*) The case of *Lafarge agt. Philson*, (3 *Sandford*, 752,) usually cited to this point, by no means supports it.

When this question comes fairly up for consideration in our higher tribunals, it will be seen whether it is possible to sustain the proposition so well asserted by Justice HARRIS, that a confession out of court is insufficient, and yet reconcile it

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with the proposition that a confession in court with this mockery of the form of an action, is perfectly valid. At any rate, no right can be founded on a judgment obtained while this cause was actually on trial, unless every right of the plaintiff wholly fails.

The defendants Humphrey & Peterson, found a claim upon the policies under an alleged agreement, that the insurance should be effected distinctly upon the carpets supplied by them, and for their exclusive benefit.

Supposing that there was no legal difficulty upon this claim, if the facts were fully established, it is manifest that great difficulty must be felt by any one in attempting to decide upon these conflicting affidavits; at any rate, the defendants do not at present make out the case in their favor.

Thus far I have examined into the various grounds urged by the defendants to sustain their claims.

As to the legal position of the plaintiffs, a few observations will be sufficient. They have obtained a judgment in a regular action instituted against all the partners, in which after the time for answering expired, they have taken judgment against two of the firm duly served with process. That such a judgment binds the property of the firm, is a point too clear to be contested, and a creditor's bill to reach joint property, may be filed upon it. (*Austin agt. Figueira*, 7 Paige, 56; *Commercial Bank of Erie agt. Meach*, *id.* 448; *Code*, § 136.)

In this situation, the legal right of the plaintiffs to the policies, appears superior to the claim of all the other parties in the cause. That they proffer to use their legal rights for the benefit of the compromise creditors alone, adds a recommendation of equity to their legal privilege. I do not consider their right to be in any way affected by their assent to the compromise agreement. The whole basis of that agreement was, that the amount due on the very policies in question should be realized. This bill is to obtain the identical fund which was to be appropriated for their satisfaction, and without obtaining which, their agreement was a nullity.

With these views, I forbear to enter into the very doubtful

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question as to the rights claimed under the alleged parol trust by which Mr. Ellis held the policies.

There remains one other point to be considered. The Mutual Insurance Company of Albany, was sued by Peterson & Humphrey in the supreme court, on the 16th day of June, 1854; and on the 14th day of September, 1854, the company made an application in that court, under which an order was made substituting the present plaintiffs, and also the members of the firm Wright, Lanier & Co., defendants in place of the said company, under the 122d section of the Code, and directing that the said defendants, the company, pay the money due on the policy to the Life and Trust Company, to the credit of such action in the supreme court. This order recites the existence of the present action, and discharges the company.

The money was accordingly paid in under this order upon the 21st of September.

On an application of the present plaintiffs, an order was made by Judge MITCHELL, on the 20th of September, to show cause why this order should not be vacated or modified. This was obtained on affidavit stating principally the pendency of the present action in this court, and its comprehensive character.

On the 19th of September, 1854, an order was made in this cause, on the application of such company, in effect discharging such company as defendants in this suit, upon a certificate of the deposit in the Trust Company being produced, under the order made by the supreme court.

It authorized the company to retain \$15, their costs in this action. I presume that when the deposit was made on the 21st, this was done.

On the 19th day of June, 1854, an action was commenced by Peterson & Humphrey against the Williamsburgh Insurance Company, upon another of the policies, in the supreme court. I understand nothing has been done in this action.

On the 19th day of June, 1854, an action was also commenced by Peterson & Humphrey against the Hamilton Insurance Company, in this court, and on the 15th of September,

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1854, an order was made in that cause substituting the present plaintiffs, and the members of the firm of Wright, Lanier & Co., except Wright, as defendants in place of the company, directing a deposit in the Life Insurance and Trust Company, of the amount of the policy to the credit of that action in which Peterson & Humphrey were plaintiffs, and thereupon that such company be discharged from all liability for such fund. This order was without prejudice to any application to be made to transfer the money to the credit of this suit, or to any receiver who may be appointed herein.

It remains to be noticed that upon filing the complaint in this action, an injunction was granted restraining the members of the firm from receiving, and restraining the three companies from paying over, the amounts due upon the respective policies. This was granted on the first of July, 1854, and soon after served.

It is desirable to disentangle this case and the parties, from the complexity which attends it, by reason of the numerous suits and orders. I have no doubt of the power of this court to do so to a great extent, and probably with authority of the supreme court, to do it effectually.

This court obtained the injunctions in a suit—to which every one interested was a party, and in which the whole controversy can be decided—on the first of July, 1854. The pendency of suits in the supreme court, to which the present plaintiffs were not parties, and indeed are not at this moment parties, forms no objection to a decision here.

The effect of that decision will be for the supreme court to determine. As to the other cause pending here, it is under the control of this court. (1 *Hoffman's Practice*, 89, and case cited.)

The order will be drawn from the following heads:

1st. Appointing the New-York Life and Trust Company, the receiver in this cause of the policies in question, and directing a delivery to such company, with the usual powers to collect, &c.

2d. That the amount paid into such company by the Ham-

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ilton Fire Insurance Company, and standing to the credit of the action of George F. Peterson, George S. Humphrey and William L. Mitchell against such company, be transferred to the credit of the said Life and Trust Company, as receivers in this action, and abide the further order or judgment of the court in this action.

3d. That all proceedings in such action in this court, where in the said Peterson & Humphrey and Mitchell are plaintiffs, and said Hamilton Fire Insurance Company are defendants, be stayed until the further order of this court.

4th. That such Hamilton Fire Insurance Company be adjudged to be free from any liability to any party in this action, by reason of such policy of insurance, and be discharged from this action.

5th. That the said, the Williamsburgh Insurance Company, and any other party to this action, be at liberty, notwithstanding the injunction in this cause, to apply to the supreme court for such orders in the suit brought therein by the said George F. Peterson, George S. Humphrey and William L. Mitchell, against such company, as may be proper.

6th. That the said, the Mutual Insurance Company of Albany, and any other party to this action, be at liberty, notwithstanding the injunction in this cause, to apply to the supreme court for such order in the suit pending therein, wherein George F. Peterson, George F. Humphrey and William S. Mitchell are plaintiffs, and such company are defendants, as may be proper.

7th. That no costs of this application be allowed in favor of either party as against any other party.

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SUPREME COURT.

THE PEOPLE agt. JAMES M. MUNRO, Sheriff of Onondaga County.

On service of an *attachment* for contempt, &c., and the party served, gives a bond with sureties for his *appearance* on the return day of the attachment; it is not absolutely necessary that he be called on the first, or return day, and especially so, if the attachment is not filed on that day; as an appearance, the *second day* is in time for him, and it should also be in time for the plaintiff or party prosecuting the attachment.

The former practice required the defendant to appear on the second non-enumerated day in term. The court does no more than that now, by requiring him to appear on the second day in a special term.

Yates Special Term, November, 1857.

MOTION by defendant to set aside an order entered at Monroe special term, on the 29th day of September, 1857, defaulting defendant, for not appearing on attachment, and directing that the bond given by the defendant on the service of the attachment, be prosecuted.

On the 24th day of September, 1857, the defendant was arrested by one of the coroners of Onondaga county, by virtue of an attachment, dated August 24th, 1857, returnable at the Monroe special term, on the 4th Monday of September, thereafter, "to answer," as the attachment stated, "certain trespasses and contempts done and committed in our said court, in not returning a certain summons and complaint in a cause in the supreme court, between Joseph Ganson and others, plaintiffs, against Williams E. Morgan and others, defendants."

On the service of the attachment, the defendant entered into a bond with sureties, in the penalty of \$200, conditioned for his appearance on the return of the attachment, to answer certain trespasses and contempts, &c., as in the attachment. On the 4th Monday of September, (the 28th,) being the first day of said special term, the defendant appeared by his counsel,

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who remained in court until the business of the court for that day was completed, and the court was about to adjourn, whereupon, on motion of defendant's counsel, an order was entered discharging the attachment and cancelling the bond, and discharging the defendant and his sureties from all liabilities on said bond; a certified copy of which order, was on the 1st day of October, 1857, served by mail upon the plaintiff's attorney, and received by him on the third day of the same month. This order, the affidavit of the plaintiff's attorney states, has been set aside on application. On the 29th day of September, being the 2d day of said special term, the plaintiff's attorney caused the defendant to be called, who did not appear, whereupon the order was entered on the same day, which the defendant now asks to have set aside.

The order, after the title of the cause, is as follows: "On reading and filing the attachment issued in this matter, and the certificate of the service thereof, on James M. Munro, sheriff of the county of Onondaga, being in open court called, and the said sheriff making default, it is ordered that the bond returned with said attachment, and now on file in this court, be prosecuted by Joseph Ganson, James M. Beaman, Charles Sillman, James H. Adkins and Byron E. Huntley.

An action has since been commenced upon the bond and is now depending.

GEO. A. KENNEDY, *for defendant.*

S. B. JEWETT, *for plaintiff.*

WELLES, Justice. I am clearly of opinion that the order of the 28th September, granted on the defendant's motion, was irregular. The writ of attachment, although returnable on that day, was not filed until the next day, the 29th.

There was nothing before the court on the 28th, to justify the order then entered, and it has been since properly vacated. The principal question is, whether the order of the 29th September, obtained on motion of the plaintiff, was regular. The Revised Statutes provide that if the defendant, against whom

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an attachment shall have been issued and returned served, do not appear on the return day thereof, the court may either award another attachment, or may order the bond taken on the arrest to be prosecuted, or both. (2 R. S. 539, § 27.)

Before the statute, the practice was to give a sheriff a day in term for his appearance subsequent to the return day of the attachment, and that a rule to prosecute the bond, would not be made until the *quarto die post*, the return day of the attachment. And it was held in an anonymous case, (3 Wend. R. 423,) that the statute did not require a departure from that practice.

The practice, where a bond was given on the service of the attachment, was to call the person attached on the return day of the attachment, and if he did not appear, to call him on the next non-enumerated day in term, which would always be at least the *quarto die post*, the return day of the attachment, and if he then failed to appear, the court would order the bond prosecuted if requested. The reason why nothing could be done after the first and before the fourth day, was, that there was no non-enumerated day until Thursday, which was the 4th day of the term. What the practice was in the late supreme court, during the period they had semi-monthly and afterwards monthly special terms, I am not advised. Under the present system, where the attachment is returnable at a special term, and the whole term is made up of non-enumerated days, and is liable not to continue four days, it would be quite inconvenient to continue the former *quarto die post* idea. The former practice required the defendant to appear on the second non-enumerated day in term. We do no more than that now, by requiring him to appear on the 2d day in a special term. A question has arisen, whether there should be two calls upon the person attached, or rather that he should be called as well on the first as the second day. I think, however, that is not necessary to the regularity of the proceedings. He may be called on the first day, and if the defendant appears, well and good, and interrogatories may be at once filed and served. But it is not, in my opinion, necessary that he be

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called the first day, as an appearance the second day is in time for him, and it should also be in time for the plaintiff, or party prosecuting the attachment.

If these views are correct, it follows that the plaintiff is regular in his proceedings. The defendant has sworn to merits, and desires to be let in to purge the contempt for which the attachment was issued.

I shall therefore direct an order to be entered, allowing the defendant to appear upon the attachment at the next special term, to be held in the county of Monroe, after the service of this order and answer, interrogatories to be filed touching the said contempt, upon payment to the plaintiff's attorney of ten dollars costs of the said order of 29th September, and ten dollars costs of opposing this motion, together with the plaintiff's costs of the action on the bond, in case he shall elect to discontinue the same.

SUPREME COURT.

EUPHEMIA M. VENCE agt. AUGUST VENCE.

The common law maxim, that the domicile of the wife follows that of the husband, has no application in actions for a divorce, where a separation has actually taken place; and where the very proceedings in the action are to show that the relation of husband and wife should be dissolved, or so far modified as to establish separate interests; and especially of bed and board, and of domicile and home.

In such a case, the law will recognize the wife as having a separate existence and separate rights. Therefore, in an action for a limited divorce, *a mensa et thoro*, for cruel and inhuman treatment, the plaintiff may properly lay the venue in the county where she actually resides at the commencement of the action, although the domicile of the defendant (where both parties formerly resided, and where the defendant actually resides,) is in another county.

Broome Special Term, February, 1858.

THIS is an action for a limited divorce *a mensa et thoro*, for
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cruel and inhuman treatment. The plaintiff was married to the defendant at the residence of her father, Richard Morris, at Butternuts in the county of Otsego, on the 19th of September, 1856. On the 24th of the same month, the parties sailed for England, and remained in England and on the continent of Europe, until in May, 1857, when the parties returned to this country, and went immediately to Butternuts in Otsego county, and resided there until in October last, when they went to the city of New-York, and went to housekeeping. The parties remained in New-York until the 7th of January last, when the plaintiff was compelled to flee from the house, from the cruel treatment of the defendant, and seek refuge and protection from her father, at his residence in Butternuts aforesaid, where she resided at the commencement of this action, with her two children by a former marriage, and where she still resides, and where she swears she intends permanently to remain. She owns property in the county of Otsego, and is a freeholder in that county, being the owner in fee of the family mansion and farm of the late General Morris, her grandfather.

The defendant claims that the defendant's domicile is in New-York, and that by the common law, the domicile of the wife follows that of the husband, and that the plaintiff, therefore, had no right to lay the venue in this action in the county of Otsego, as both parties are residents of the city of New-York. The defendant demanded that the place of trial be changed to the city and county of New-York, which the plaintiff refused, and defendant now moves, as well upon this ground as for the convenience of witnesses, that the place of trial be changed to the city and county of New-York.

GEORGE C. GENET and THOMAS D. WRIGHT, *for defendant.*
HENRY R. MYGATT, *for plaintiff.*

MASON, Justice. The 125th section of the Code requires actions to be tried in the county in which one of the parties shall reside at the time of the commencement of the action. If the common law maxim that the domicile of the wife follows

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that of the husband, prevails in these adversary proceedings for a decree of separation, then the place of trial in this action must be changed to the city and county of New-York.

I am satisfied, however, after a careful examination of the matter, and the best reflection which I have been capable of bestowing upon the subject, that the common law maxim that the domicile of the wife follows that of the husband, has no application in actions for a divorce, where separation has actually taken place, and where the very proceedings in the action are to show that the relation of husband and wife should be dissolved, or so far modified as to establish separate interests, and especially of bed and board, and of domicile and home.

In such a case, the law will recognize the wife as having a separate existence and separate rights. (14 *Pick. R.* 185.) As the husband can change his domicile at will, the wife would have very little protection under the law, where the husband had forfeited his marital rights, if we admit the doctrine that her domicile follows his. He might, when his own misconduct gave the wife a right to be rescued from his power on account of his cruelty and misconduct towards her, deprive her of the means of enforcing her rights, and in fact of the rights themselves, and of all protection under the law, by fleeing to a foreign country, if the maxim be admitted to prevail in such a case, that the domicile of the wife follows that of the husband. (14 *Pick. R.* 186; 5 *Pick. R.* 461; 10 *Mass. R.* 260.) This maxim, that the domicile of the wife follows that of the husband, only applies when the ordinary relation of husband and wife exists in union and harmony. It is founded upon the theoretic identity of person and of interest, as established by law, and the presumption that from the nature of that relation the home of the one is that of the other; but, when in fact, that relation of the identity of home has been severed by the misconduct of the husband, and no longer as matter of fact exists, but the relations of the parties, on the contrary, have become hostile, then it seems there is no longer unity of domicile, and the maxim of unity of domicile, no longer prevails. (14 *Pick.*

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R. 185, 186.) It has been repeatedly held, that the residence of the husband is not the residence of the wife, for the purpose of giving jurisdiction over her person in proceedings for divorce. (14 *Mass. R.* 281; 2 *Cowen & Hill's Notes*, 879; *Richardson* agt. *Richardson*, 2 *Mass. R.* 158; *id.* 167; 3 *Mass. R.* 184.)

In the case of *Irby* agt. *Wilson*, (1 *Devereux & B. Equity R.* 568, 582,) the court decided that in divorce cases, the domicile of the wife will be held to be where she actually resides.

In the case of *Harding* agt. *Alden*, (9 *Greenleaf's R.* 147,) the court regard the husband and wife as having different domicils, in view of the law regulating divorces. There is nothing in the Massachusetts cases, referred to by the counsel for the defendant, which conflicts with the views above expressed, unless the reasoning in *Greene* agt. *Greene*, (11 *Pick. R.* 409,) should be regarded as conflicting; and if it is to be so considered, it is more than answered by the same court in *Harteau* agt. *Harteau*, (14 *Pick. R.* 181.) Our statute allows the plaintiff to fix the place of trial in the county where either of the parties reside. This means their actual residence, and as the plaintiff was a resident of Otsego county at the time of the commencement of this action, the venue was properly laid there.

The motion is fully defended upon the merits and must be denied.

NEW-YORK COMMON PLEAS.

LEWIS O. WILSON agt. THE MAYOR, &C. OF NEW-YORK.

A party can only demur, where the ground of the demurrer appears on the face of the complaint. In so demurring, the party must state the ground of demurrer on which he relies, and can only obtain judgment for the cause stated in the demurrer.

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Wherever the matter of objection does not appear on the face of the complaint, then it may be set up in the answer; and if no such objection (that is, an objection to the jurisdiction which does not appear on the face of the complaint) be taken by demurrer or answer, it shall not be deemed waived.

General Term, December 31, 1857.

THIS was an action brought to restrain the collection of a tax, imposed upon the plaintiff, as the owner of personal property in the city of New-York; it being alleged that the plaintiff at the time of the imposition of the tax, was a resident of the state of Connecticut, and had been assessed and taxed for his personal property in such state for the year in question.

The defendants demurred, on the ground that the complaint did not state facts sufficient to constitute a cause of action. Judgment was given at the special term for the defendants on the demurrer, and the plaintiff appealed to the general term.

A. F. SMITH, *for plaintiff.*

R. BUSTEED and A. R. LAWRENCE, JR., *for defendants.*

By the court—INGRAHAM, First Judge. This case comes before us on an appeal from a judgment at special term, sustaining a demurrer to the complaint.

The ground of demurrer is stated to be, that the complaint does not state facts sufficient to constitute a cause of action; and the judge decided against the plaintiff, upon the ground that the court, as a court of equity, had no jurisdiction.

The ground thus stated, is different from that stated in the demurrer, and the question is submitted to us, whether judgment can be given in favor of a demurrant for a cause different from that which is stated in the demurrer.

The 144th section of the Code specifies six distinct grounds, for either of which a party may demur; and section 145 provides that the demurrer shall distinctly specify the grounds of objection to the complaint. If it do not, it may be disregarded.

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I can see no good reason why a demurrant should be allowed to state one cause for demurrer, and succeed on another which he has not stated. The object of the legislature in requiring the demurrer to state the grounds of objection to the complaint, was to give the opposite party notice of the alleged defect, such is the whole system of pleading as it exists under the Code. The complaint and answer are required to contain a plain statement of the cause of action or defence. No form is necessary, and no technicalities are encouraged; and the same system applied to the demurrer, requires that it should plainly state the ground on which the demurrant rests his objection to the pleading. The object of the demurrer is to raise an issue upon the law, as the answer does upon the facts, and upon the trial, the court is confined to that issue. It can never be upheld as an orderly proceeding in a court, while trying an issue of law, to find upon that issue in favor of one party, and to hold that there were other reasons, not involved in the issue, why judgment should be rendered against him.

It has been suggested that by the 148th section, the objection to the jurisdiction of the court, is not to be deemed waived by the omission to set it up in demurrer or answer, but may be taken at any time.

By referring to section 144, it will be seen that a demurrer is only allowed where the ground of objection appears on the face of the pleading. Unless such objection appears in the pleading, it is no ground of demurrer, and the want of jurisdiction or other objection, not appearing in the pleading, must be set up in the answer.

This was held by Judge HARRIS, in *Getty agt. Hudson River Railroad Company*, (8 How. 188,) where he says: "It is not to be forgotten that a demurrer is only appropriate when the ground of objection appears on the face of the pleading."

By the 147th section, it is provided, that if the matter of objection does not appear on the face of the complaint, it may be set up in the answer; but if not so stated, where the

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objection is to the jurisdiction, or the want of stating a good cause of action, the same is not be deemed waived.

Taking these sections together, it is clear that a party can only demur, where the ground of the demurrer appears on the face of the complaint; that in so demurring he must state the ground of demurrer on which he relies, and can only obtain judgment for the cause stated in the demurrer; that wherever the matter of objection does not appear on the face of the complaint, then it may be set up in the answer; and if *no such objection* (that is, an objection to the jurisdiction which does not appear on the face of the complaint) be taken by demurrer or answer, it shall not be deemed waived, &c.

In the present case, the facts are so fully disclosed in the complaint, that the ground upon which the judgment appealed from was rendered, is apparent upon the face of it, and the same does not come within the exception, as stated in the 148th section.

It appears to me, therefore, that it was erroneous to render judgment for the defendant upon this demurrer for the cause stated. This view of the question of practice, renders it unnecessary to examine the question upon the merits.

Judgment reversed, and judgment ordered for plaintiff, upon demurrer, with leave to the defendants to answer, on payment of costs.

COURT OF APPEALS.

THE PEOPLE agt. FRANCIS McCANN.

On the trial of an indictment for murder, where the defence of *insanity* was interposed, the presiding judge at the oyer and terminer, charged the jury as follows: "The fact of killing is admitted; that the act was done by prisoner is not disputed. Thus, the issue is really reversed from the usual one. The question of insanity is matter of positive defence, and it is a defence to be

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affirmatively proved; a failure to prove it is (like all the failures to prove any other fact) the misfortune of the party attempting to make out the proof. And in this case, as in all other cases of fact, you are not to presume what has not been proved under the distinctions, and upon the principles already given you."

"The act being plainly committed, and that the prisoner did it being undoubted, and the defence set up on his part that he was insane, the *burden of proof is shifted*. In the proof of the deed itself, if any reasonable doubt be left on your minds, the prisoner is to be acquitted; but as sanity is the natural state, there is no presumption of insanity, and the defence must be proved *beyond a reasonable doubt*. If (canvassing the whole evidence on the legal principle laid down in the charge) the prisoner has satisfied you so far beyond a reasonable doubt, that you find that he was, at the time of the killing, so far really insane as not to be responsible (under the directions stated to you) for this particular act, you acquit, otherwise you convict."

Held, (by the court of appeals,) that although it is true, that sanity is the normal condition of the human mind, and in dealing with acts criminal or otherwise, there can be no presumption of insanity; yet, it is not true, upon the traverse of an indictment for murder, when the defence of insanity is interposed, and the homicide admitted, that the issue is reversed, and the burden is shifted.

The burden is still the same, and it still remains with the prosecution to show the existence of those requisites, or elements which constitute the crime, and of these, the intention, or *malo animo* of the prisoner is the principal. Notwithstanding the legal presumption, the sanity of the prisoner's mind is under all the definitions of the crime, to be made out affirmatively upon the trial, as a part of the case for the prosecution.

There must be care to distinguish between what constitutes proof, including those presumptions which the law regards as equivalent to proof, in a *criminal case*, and what is understood by the burden of proof, or *onus probandi*.

The act of 1855, (*Sess. Laws 1855, p. 613, § 3*), provides substantially that whether any exception shall have been taken or not, on the trial, the prisoner if convicted, can take (on writ of error as matter of right) any exception in or out of the case, and shall be at liberty to claim a new trial on any ground. This statute was considered by the supreme court at the general term, (GOULD, J., delivering the opinion,) and held to be unconstitutional, it being embraced in a local bill on a different subject. The question was not considered (or at least, decided) by the court of appeals. The exceptions in this case were not taken on the trial, but on the argument in the appellate courts.

(The opinion of Judge GOULD in this case, delivered at general term, is given so far as it discusses the questions above stated. The opinion of the court of appeals by Judge BROWN is given entire, and then follows the last charge to the jury of Judge GOULD on the third trial, entire. The case will attract attention and interest from its general notoriety, and particularly so now, as there are occasionally, between the distinguished judges (at the trial, and the appeals) some sharp differences of sentiment flashing up, illuminating the legal horizon, and discovering different sources of judicial construction.—[REPORTER.]

Supreme Court, Albany, March General Term, 1857.

GOULD, Justice. The remaining ground of exception (the prisoner's 8th point) is one that is of great interest; not merely in this particular case, but to the whole community, as it concerns the entire administration of justice in criminal cases. The frequency, a frequency that is so great as to have passed into a proverb, (if a by-word be not the apter phrase,) the great frequency of the interposition of this plea of insanity, whenever and wherever punishment hangs imminent over crime, makes absolutely necessary the adoption of some rule, that shall be both based on sound principles of plain and easy application, while it shall, to the prisoner and to the public, secure neither more nor less than even-handed justice. And while all human tribunals are bound to treat with reverence the dispensations of providence, and to deal kindly with those who suffer under such dispensations, those tribunals have also in charge the general good of the whole community, and the personal safety of every member of it. Well then, and carefully does it behoove us to inquire what is the nature of this defence of insanity, and by what kind and degree of proof is it to be made out? To keep the precise point in view, the charge so far as relates to this exception, was: "The question of insanity is matter of positive defence, and it is a defence to be affirmatively proved. A failure to prove it, is (like the failure to prove any other fact) the misfortune of the party attempting to make the proof. And in this case, as in all cases of fact, you are not to presume what has not been proved, (under the distinctions and upon the principles already given you.) The act being plainly committed, and that the prisoner did it, being undoubted, and the defence being set up on his part that he was insane, the burden of proof is shifted. In the proof of the deed itself, if any reasonable doubt be left on your minds, the prisoner is to be acquitted. But as sanity is the natural state, there is no presumption of insanity. And the defence must be proved beyond a reasonable doubt. If canvassing the whole evidence on the legal

principles laid down in this charge, the prisoner has satisfied you so far beyond a reasonable doubt, that you find that he was, at the time of the killing, so really insane as not to be responsible for this particular act, you acquit, otherwise you convict."

This is claimed by the prisoner's counsel to contravene the rule established in trials for capital offences, that the prisoner is entitled to the benefit of a reasonable doubt of his guilt. And they thus paraphrase the rule, "if the jury had a reasonable doubt of sanity they should acquit." This is not the rule, but a perversion of it; and the very language used begs the whole question. It assumes that (on the part of the prosecution) sanity is to be proved: for it is too plain to admit of argument, that the rule (as to a doubt) never did and never can apply to what the prosecution is not bound to prove. And sanity is not a condition or state which the law compels the prosecution to prove.

Being man, the accused is possessed (in legal presumption) of the powers and faculties of body and mind, which are included in the name. And the only proof to be made on that point, is that of the defence; and the defence asserts the fact that the prisoner differs from other men; that the reason, which is a part of his human nature, is impaired or lost; that he has ceased (by the positive operation of disease) to be the accountable agent described by the word man. Of necessity, and to the least informed understanding, the burden of proving this fact rests on him who asserts it; and suspicion is not proof—a doubt is not proof; raising a doubt is not proving a fact. These positions are but amplifications of the charge which is objected to. And the true tenor of that charge, its length and breadth, with or without the words "beyond a reasonable doubt," is fully covered by what, though not in the bill of exceptions, was actually part of the charge as given to the jury: "The prisoner must satisfy you by proof, that he was so far really insane, as not to be responsible for this particular act." This surely covers the whole ground. For, if on any point the mind be satisfied, it is utterly impossible

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that it can on that point have "a reasonable doubt." The two states of mind—doubt and satisfaction—cannot co-exist on one point. And to apply to this the most unquestionable legal principle, a jury cannot find a fact, as proved, which is not proved to their satisfaction. By their oath they are bound to find "a true verdict according to the evidence," and the fact of insanity is to be found, not suspected. Every proper charge, touching on insanity to a jury, says: if you find that the prisoner was insane at the time, you acquit.

Thus far, as a matter of reasoning. Let us now see what, if any, is the authority; and for this, we cannot probably do better than to resort to the opinions given to the house of lords, to which both parties before us, and all our own reported cases, are so ready to refer; and (*at pages 184 and 185 of 47 Eng. Com. Law Rep.*) I find all that is by them said on this point, in the opinion (of all but Justice MAULE, who says nothing on this point,) given by the chief justice, which says: "The jury ought to be told in all cases, that every man is presumed to be sane, and to possess a sufficient degree of reason to be responsible for his crimes, until the contrary be proved to their satisfaction; and that to establish a defence on the ground of insanity, it must be clearly proved that at the time of the committing of the act, the party accused was laboring under such a defect of reason, from disease of the mind, as not to know the nature and quality of the act he was doing; or if he did know it, that he did not know he was doing what was wrong." I can see no point of the preceding reasoning, in support of the charge, which is not completely covered by this opinion. "Proved to their entire satisfaction," is even more absolute in signification, without the words, "beyond a reasonable doubt," than it would be with them; and so far as I am informed, (by the argument or otherwise,) there is no authority varying from this but the *2d Alabama*, 48, and from that the quotation (on the points for the prisoner) is such, as by no means to entitle it to prevail against the opinion above quoted. Mark the phrase, "every member of the jury may have had a reasonable doubt of the prisoner's sanity." This

is, perhaps, a degree above suspicion, but if it be, it does not state the issue, it reverses it, since such a remark can apply to no point, which the prosecution is not bound to prove.

In the very ingenious and strongly urged argument in behalf of the prisoner, two matters of defence were claimed to be analogous to that of insanity; in each of which two, the prisoner is entitled to "the benefit of the doubt." But I think a strict examination of them will show that neither one really bears out the supposed analogy. The first of them is an *alibi*. This surely affords no parallel to the defence of insanity; as presence at the act (unlike sanity) is not presumed, and the proof of an *alibi* (though in itself affirmative) goes to what the law assumes to prove affirmatively; that is, that the prisoner (the physical being on trial) did the act;[1] and such defence is, substantially, but in the nature of conflicting evidence. It is not a separate or a separable issue, but a fact, going to the main issue already made, and is a mere contradiction of the people's affirmative of the issue; a negative of an averment, necessary in the indictment, and one requiring to be made certain by proof, to the satisfaction of the jury, or (which as above shown is the same thing) "beyond a reasonable doubt," (and proof beyond a reasonable doubt cannot be predicated as necessary to both sides of one and the same issue,) so a reasonable doubt in that issue, the people's affirmative issue, of course, acquits.

So of the other asserted analogy, "a homicide being proved, the defence proves circumstances to show that the killing was in self-defence." The very statement shows it not analogous. The proof, though affirmative, (i. e. positive, not affirmative as meaning the affirmative side of an issue,) is but of circumstances connected with the very deed, with the doing of the act charged as a crime in the indictment, and to be proved by the people. Acting in self defence is part and parcel of

[1] The charge that the prisoner did the act, (which is all to be proved,) includes his presence where it was done. And an *alibi*, though in form, positive, is merely an argumentative negative of the main issue. Thus, I was at a different place, and, therefore, I was not present at the act, and could not have done it.

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the transaction, of its very manner and substance; and (whether shown by the witnesses for the prosecution, or by the witnesses called by the accused) is but in the nature of conflicting evidence, on the main issue; like a cross-examination, going to the body of the charge. It is as strictly, but showing how the killing was done, as would be evidence (cross or direct) tending to show the killing to have been accidental. Nor is it sound, either in law or in logic, to say that insanity is like any other negation of the offence; that it is but saying this man did not commit it, but a different being, a mad man did it. This is already fully answered; this person did it, and if you assert, that he is a different being from what he appears to be, claim him to be governed by delusion, instead of reason, to be diseased, to be a mad man, prove it.

And it is but a modification of the same position, to say that if the act were done by an insane man, an essential ingredient of crime was wanting, there being an absence of intent; which intent (either presumed or proved) is an affirmative part of the prosecution's case, and is to be shown "beyond a reasonable doubt." To this, the answer is, the intent is not wanting, even were the person a raving maniac. The maniac intended to do what he did, to kill the person killed, (or there is a very different defence in accidental killing.) But the maniac is not responsible for his intent, or its consummation, though cunningly planned, long premeditated, and cruelly carried out. It is the responsibility that is wanting, and the excuse interposed to avoid this responsibility, (to prevent the effect of an intent, which unexcused has every essential of an intent legally criminal,) is not anything incident to, or part of, or connected with the act; but exists in the man, and not in his deed.

There is a further position on the prisoner's points, which deserves, at least, a passing notice. This "bill of exceptions" shows that no exception was taken on behalf of the accused, to any part of the charge; and that no request (on his part) to charge was denied. To any man of common sense, and much more to a lawyer, it would seem that the prisoner had, in the

charge to which he consented, nothing to complain of; and no right now to except to that to which he then agreed. But an act of the legislature (*Laws of 1855, p. 613, § 8.*) interferes with this plain common sense, and with this plain common law, and says that "whether any exception shall have been taken or not" on the trial, the prisoner, if convicted, can take (on writ of error, as matter of right) any exception in or out of the case, and shall be at liberty to claim a new trial on any ground he can find, or suggest, or invent, before the court above. Under this act, if the prisoner does not like the looks of his jury, or if he does, or if he thinks two chances better than one, or if he thinks it pleasant to play with the law, its officers and courts, or wishes to know the whole of the people's case, to fit to it a defence made up, he has only to allow an improper question to a witness to pass unchallenged, or even by his own suggestion have an improper ruling made, and then bring his writ of error, and bring in his false defence, and try his luck once more. And this experiment he may repeat as often as the shape of his case will let him. I think the act must be admitted to be most remarkably adapted to the attainment of justice! Still, if such be the law of the land, it is to be enforced. Is it the law of the land?

The constitution (*art. 3, § 16.*) says, no private or local bill shall embrace more than one subject, and that shall be expressed in the title; the title of the act in question is, "An act to enlarge the jurisdiction of courts of general and special sessions of the peace, in and for the city and county of New-York;" as plainly a local bill, as one for opening a park in that city. But the 8d section of the act, says: (at the page referred to) "every conviction, &c., shall be brought before the supreme court and court of appeals from the courts of oyer and terminer of this state; or from the said court of general sessions, &c., by a writ of error, with a stay of proceedings as a matter of right." There is here put into a local bill a general provision totally different from the purposes of the act; (embracing another subject, an entirely foreign jurisdiction, so far as the "city and county of New-York"

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are concerned, and their "courts of sessions") and one not expressed in the title, or intimated there. It is just such a provision as would not attract attention; as would slip in unobserved by those who looking to the title, considered it a merely local act, interesting to members from the city of New-York and to them only. It is precisely within the mischief, to remedy which the provision cited was put in the constitution. And its general nature cannot make the bill other than local, or give effect to either a trick or a blunder which is a palpable fraud on both the law and the constitution. I consider it plainly unconstitutional, as well as being in the teeth of all legal principles, and all honest practices.

The discussion which its existence has permitted in this case, I deem of much more consequence than any limited mischief it may do; and I am more than willing that the points taken, should be followed out to a decision so authoritative, as to settle the law of this state, on questions so vitally important to the community; and I am gratified that, even by the means of such a section, full and free opportunity may be given to have any erroneous decisions I may have given, corrected by higher tribunals and abler judgments, although until they have been so corrected, and to the end that the correction may be as broad and clear as the error, I deem it not only proper for me, but my duty, to give my reasons for my acts, that both may be fully considered and may stand or fall together, if indeed they belong together.

By the court—BROWN, Judge. I cannot give my assent to the legal proposition embraced in the charge of the judge upon the trial of this action; I think it at variance with sound reason, and the just and humane principles of the common law. The killing by violence was clearly made out by the proof, and the defence was insanity. The judge in the charge treated the condition of the prisoner's mind as a thing separate from the act which constituted the crime, and the delusion or defect of reason, under which it was alleged the act was committed, to be affirmatively established by the prisoner like

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those defences in civil actions which admit the cause of action, but insist it has been determined by some subsequent matter, and until the homicide is made out to the satisfaction of the jury the burden of proof is upon the people, and if there is any doubt, the prisoner is to have the benefit of it. But whenever the killing is proved or admitted, and the question of sanity arises, the issue and the burden as well as the party to be benefited by the existence of a reasonable doubt, is changed. If the principal question, and indeed the only question litigated, is involved in so much uncertainty, that the jury are unable to say whether the prisoner was sane or insane, whether in fact he was a responsible creature, or one without reason, their duty was to convict and not to acquit. This is the theory of the charge. It is very technical and artistic, and strictly applicable to defences in civil actions upon matter arising subsequent or separate from the cause of action, but not to crimes which consist of acts, coupled with intentions animating minds capable of reason and reflection, and of comprehending the distinction between right and wrong. So that there be no misapprehension, I quote from the charge as I find it in the bill of exceptions. "The fact of killing," said the judge, "is admitted; that the act was done by the prisoner is not disputed. Thus the issue is really reversed from the usual one. The question of insanity is matter of positive defence, and it is a defence to be affirmatively proved; a failure to prove it is (like all the failures to prove any other fact) the misfortune of the party attempting to make the proof. And in this case, as in all other cases of fact, you are not to presume what has not been proved, under the distinctions, and upon the principles already given you. The act being plainly committed, and that the prisoner did it being undoubted, and the defence set up on his part that he was insane, the burden of proof is shifted. In the proof of the deed itself, if any reasonable doubt be left on your minds, the prisoner is to be acquitted, but as sanity is the natural state, there is no presumption of insanity, and the defence must be proved beyond a reasonable doubt. If (canvassing the whole evidence on

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the legal principle laid down in the charge) the prisoner has satisfied you so far beyond a reasonable doubt, that you find that he was, at the time of the killing, so far really insane as not to be responsible (under the directions stated to you) for this particular act, you acquit, otherwise you convict."

It certainly is true, that sanity is the normal condition of the human mind, and in dealing with acts criminal or otherwise, there can be no presumption of insanity. But it is not true, I think, upon the traverse of an indictment for murder, when the defence of insanity is interposed, and the homicide admitted, that the issue is reversed and the burden shifted. The burden is still the same, and it still remains with the prosecution to show the existence of those requisites or elements which constitute the crime, and of these the intention or *malo animo* of the prisoner, is the principal. The doctrine of the charge proceeds upon the idea that the homicide is *per se* criminal; that the mere destruction of human life by the act of another, is without any other circumstance, murder, or some of the degrees of manslaughter. "The fact of killing," says the judge, "is admitted; that the act was done by the prisoner, is not disputed; thus the issue is really reversed from the usual one." It is doubtless true, that when the killing by the prisoner is established by proof, the law presumes malice, and a sufficient understanding and will, to do the act. The malicious purpose, the depravity of heart, the sufficient understanding and will, must actually exist, however. They are each of them as much the essence of the crime as the act of killing, and the rule which presumes their existence, is a rule of evidence and nothing else; and when the law presumes their existence, it recognizes and demands their presence as essential to constitute the crime. The jury must conscientiously believe they exist, or else they cannot convict. The killing of a human being by another is not necessarily murder or manslaughter. It may be either excuseable or justifiable. It may have been effected under either of those conditions referred to by the elementary writers, in which the will does not join with the act, and then it is not criminal.

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We must be careful to distinguish between what constitutes proof, including those presumptions which the law regards as equivalent to proof in a criminal case, and what we understand by the burden of proof. By the *onus probandi*, I understand, is meant the obligation imposed upon a party who alleges the existence of a fact or thing necessary in the prosecution or defence of an action to establish it by proof. It may be proved by the production of evidence the usual way, or the law under certain circumstances, in certain cases, may presume its existence without proof. But it is nevertheless a part of the case of the party who alleges its existence, and to be made out beyond any reasonable doubt. Whenever it may be presumed to exist in the absence of proof, the presumption may be repelled and overcome by evidence; and whenever the repelling proof leaves the fact to be established in doubt and uncertainty, the party making the allegation is to suffer, and not his adversary. Sound memory and discretion at the time of killing, is oftentimes the only material question upon the trial of an indictment for murder. They are essential elements of the crime, to be established upon the trial as a part of the case of the prosecution. A vicious will without vicious act, says Mr. Blackstone, (*Com. Vol. IV, 21.*) is no civil crime. So on the other side, an unwarrantable act without a vicious will, is no crime at all; so that to constitute a crime against human laws, there must be, first, a vicious will, and secondly an unlawful act, consequent upon such vicious will. If there be a doubt about the act of killing, all will concede that the prisoner is entitled to the benefit of it, and if there be any doubt about the will, the faculty of the prisoner to discern between right and wrong, why should he be deprived of the benefit of it, when both the act and the will are necessary to make out the crime. The same writer also remarks that where there is a defect of understanding, the will does not join with the act. For where there is no discernment there is no choice, and where there is no choice there can be no act of the will, which is nothing else but a determination of one's choice to do, or abstain from a particular action. He, there-

fore, that has no understanding, can have no will to guide his conduct. I am not controverting the legal presumption in favor of sanity until the contrary appears. I am not dealing with legal presumptions of any kind. I am treating of doubts and uncertainties touching guilt or innocence, which arise upon the trial of most capital offences, and of the obligations which the law imposes, and which reason and humanity demand, that such doubts and uncertainties shall be removed before there can be a conviction, and a consequent deprivation of life.

It is worth while now to turn to the definition of the crime at common law, as given by the old writers, in order to see of what it consists. The statute has introduced some slight modifications, but for all the purposes of the present inquiry, the definition remains the same. It is thus defined by Sir Edward Coke (3 *Just.* 77 :) "When a person of sound memory and discrimination unlawfully killeth any reasonable creature in being, and under the king's peace, with malice aforethought, express or implied." It is to be remarked that every member of this sentence is of the mightiest import in determining the constituents of the crime. The killing must have been effected by a person of sound memory and discretion. It must have been unlawful killing; that which is deprived of life must have been a reasonable creature in being, under the king's peace, and the killing must have proceeded from malice, expressly proved, or such as the law will imply, which is not so properly spite or malevolence to the deceased, as any evil design in general—the dictate of a wicked, depraved and malignant heart. Every one of these things must have existed, in order to make out the crime, and they must be proved or presumed upon the trial to have existed, or the prisoner is to be acquitted. They are primarily a part of the case for the prosecution, to be established to the satisfaction of the jury beyond a reasonable doubt. The law presumes malice from the mere act of killing, because the natural and probable consequences of any deliberate act, are presumed to have been intended by the author. But if the proof leaves it

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in doubt whether the act was intentional or accidental, the scales are so equally balanced, that the jury cannot safely determine the question, shall not the prisoner have the benefit of the doubt? And if he is entitled to the benefit of the doubt, in regard to the malicious intent, shall he not be entitled to the same benefit upon the question of his sanity? his understanding? for if he was without reason and understanding at the time, the act was not his, and he is no more responsible for it than he would be for the act of another man. The cases which have arisen under the license laws, and the English game laws, and when the doubt has been upon the existence of the license, or the necessary qualifications, are not analogous to the present, because the necessary qualifications and the license upon which the defendant relied for a defence, are entirely separate from, and independent of the acts which constituted the offence. In the *Com. agt. York*, (1 *Bost. Law Rep.* 510,) question in dispute was, provocative or natural combat; the supreme court of Massachusetts held that "if the case or the evidence should be in *equilibrio*, the presumption of innocence will turn the scale in favor of the accused. But if the evidence does not leave the case equally balanced, then it is to be decided according to its preponderance." In the case of *Com. agt. Rogers*, (1 *Met.* 500,) the defence was insanity, and it was held that being in the nature of a confession and avoidance, must be shown beyond a reasonable doubt, to entitle the jury to acquit the accused. These two cases are irreconcilable in principle, and the reason given for the latter is utterly unsound for the defence of insanity. So far from confessing the offence, I think seeking to avoid it, denies absolutely the existence of sufficient capacity to incur guilt and commit crime. The answer of the judges, as given by Ch. J. SIMDAB, in *McNaughton's Case*, (47 *Eng. Com. Law Rep.* 129,) does not by any means dispose of the question under consideration. He says: "The jury ought to be told in all cases, that every man is to be presumed to be sane, and to possess a sufficient degree of reason, to be responsible for his crimes, until the contrary is proved to their satisfaction, and that to establish a

defence on the ground of insanity, it must be clearly proved that at the time of the committing of the act, the party was laboring under such a defect of reason from disease of the mind, as not to know the nature and quality of the act he was doing, or if he did, that he did not know he was doing what was wrong." These expressions are not without their value, but they furnish no guide when the question is shrouded in doubt and obscurity. When psychological science shall be able to define with precision, the exact line where reason leaves and unreason supervenes, then we shall be better able to say what is to be considered the clear proof of a defect of reason referred to in this opinion. What was said by Ch. J. HORNBLOWER, in *State agt. Spencer*, (1 *Zabriskie*), is not inconsistent with itself. After asserting that when there is doubt of the insanity, the jury ought to find against the prisoner, it proceeds to say: "I do not mean to say that the jury are to consider him sane, if there is the least shadow of a doubt on that subject, any more than I would say they must acquit a man when there is the least shadow of doubt of his having committed the act. What I mean to say is, that when the evidence of sanity on the one side, and insanity on the other, leaves the scale in equal balance, or so nearly poised, that the jury have a reasonable doubt of his insanity, then a man is to be considered sane, and responsible for what he does. But if the probability of his being insane at the time, is from the evidence in the case very strong, and there is but slight doubt of it, then the jury would have a right, and ought to say, that the evidence of his insanity was good." I find it difficult to reconcile the different parts of this opinion. The result, however, seems to be, that the jury are to be governed by the degree of uncertainty in which the question is left by the proof. Whatever has fallen from these eminent men, will doubtless be accepted with the most profound respect; but what they have said would be entitled to greater weight upon the present occasion, did it distinctly appear that their attention was directed to the circumstance, that notwithstanding the legal presumption, the sanity of the prisoner's mind

is, under all the definitions of the crime, to be made out affirmatively upon the trial, as a part of the case for the prosecution. I conclude, therefore, that the judge erred in his charge to the jury. If my brethren see no objection to the form in which this question comes before the court for reversal, under the provision of the 3d section of the act of the 12th of April, 1855, to enlarge the jurisdiction of general sessions of the peace in and for the city and county of New-York, (a subject which I have not been able to examine,) then the judgment should be reversed and a new trial granted, whatever may be the event. I have deemed it a fit occasion to discuss the principal question involved in the judge's instructions to the jury, to the end that those who preside at the trial of persons accused of capital offences, may know whether the presumption of innocence applies to all, or only some of the facts which constitute the crime.

JUDGE GOULD'S CHARGE.

Gentlemen of the Jury.:—It has been stated to you that in this case, you are called on to discharge a very unusual duty, that of passing upon the guilt or innocence of a man, who is now for the *third time* on trial for his life. This is certainly true, gentlemen. But while it may well be that it is an uncommon, perhaps an unparalleled circumstance, it is equally true that the manner and the means by which it has been brought about, are as uncommon, and I trust will continue to be without any parallel. It certainly does not lie with the prisoner to *find fault* with it; or with his counsel to ask at your hands any consideration on account of it; since the conviction, (obtained at the first trial,) was set aside at the prisoner's request and *in his favor*, by a most peculiar application of the mercy of the law.

To attain this end, the court of appeals introduced a new principle into our criminal law. And as the opinion given by Mr. Justice BROWN in that court states (with commendable complacency) that it is written, "that those who preside at the

trial of persons accused of capital offences, may know" their duty; I being unfortunately one, am compelled to examine that opinion, and to charge you in accordance with it. And I shall certainly do so, as far as I am able.

This new principle is, however, not the only unusual point that was needed to reach a new trial after the first conviction. The legislative wisdom of 1855, had seen fit to provide that, in capital cases, a person convicted in any court of oyer and terminer, should be entitled to his *bill of exceptions as a matter of right*; and on the appeal might take any exception warranted by the whole case, *whether or not he took any exception on the trial*. The wisdom of this law we may not question, since courts (other than the highest) are bound to *administer laws*, not *make* them.

Under this invaluable provision, this prisoner was enabled to take a bill of exceptions, *upon an exception not taken at the trial*. Not only so, *but to take an exception and obtain a new trial upon a charge given upon and in precise accordance with the written request of his own eminent counsel, the present attorney-general of this state*. That written request I now read from my minutes of the first trial:

"That if the jury *is satisfied from the evidence*, that at the time the alleged offence was committed, the prisoner, in consequence of partial insanity, was laboring under such a defect of reason as (not to be conscious of the nature, character and consequences of the act, or) not to know that the act was wrong—he should be acquitted."

My variation from this request was in another part of the charge, and was merely *verbal*, (to make the rule plain to the comprehension of twelve men who were not lawyers,) that he must have proved the existence of the insane delusion to the satisfaction of the jury *beyond a reasonable doubt*, or they would convict. To a lawyer, or any logical reasoner, it is superfluous to add that *if the jury were satisfied*—they were necessarily satisfied beyond a reasonable doubt.

The *personal* character and standing of the attorney-general are far too high to allow any one to suspect that his request

was intended as a *trick* to avoid the risk of conviction, by *preparing a concealed ground* for obtaining a new trial. And his *legal* character and standing are an abundantly sufficient guaranty that his opinion that *such was the law*, was in accordance with all prior legal precedents. The prisoner being thus shown to be here *at his own request*, as well as in direct contravention of all ordinary rules and proceedings, he is entitled to *no more* consideration at your hands than if this were a first trial ; nor is he or the public, therefore, to receive *any less*.

Fortified thus by the written opinion of the highest law officer of the state, I may proceed to say that we may fairly assume that the principle laid down by the court of appeals is *new*, when after all the researches of the prisoner's able counsel, and after repeated and elaborate discussions, and (of course) full and profound judicial investigation, *no one decided case* is even hinted at by Mr. Justice BROWN, as bearing out the rule imposed on the prosecution in this case ; while the opinion given as a guide finds it necessary to combat adjudications of high authority.

It is true that the rule is claimed to be founded on what is stated to be Sir Edward Coke's *definition* of murder, which is thus given : " Where a person of sound memory and discretion unlawfully killeth any reasonable creature, in being and under the king's peace, with malice aforethought, express or implied," (*citing 3 Inst. 47.*) On this it is to be remarked that the citation seems to be taken from Coke at second hand, as found in Blackstone, (4 *Com.* 195.) But Blackstone did not correctly cite Coke, for Coke's language is : " Where a man of sound memory, and *of the age* of discretion, unlawfully killeth," &c.

Blackstone, be it observed, does *not* give that sentence of Coke's as a *definition* of murder, for he says : " Murder is therefore now defined, *or rather described*, by Sir Edward Coke." And Blackstone himself, had (in the same chapter) before given his own *definition* of all kinds of *felonious homicide*, as, " the killing of a human creature *without justification or excuse*." And after this, in separating the grades of homicide into mur-

der, manslaughter, &c., he inserts the above cited description by Coke.

In the state of New-York, the *statute* of New-York—judicially known to every court—gives the *definition* of murder which binds us. And that definition is, in substance identical with Blackstone's. It is thus, (2 *Rev. Stat.* 656, 657, *combining sections 4 and 5* :) "The killing of a human being without the authority of law, when perpetrated from a premeditated design to effect the death, &c., *is murder.*" And this "premeditated design," is, by our courts, decided to be *the intent to do the act done*, of which death was the natural consequence; the prosecution being *never* bound to *prove the intent otherwise than by the act*, leaving matter of excuse to the defence; the legal shape of an issue (with its incident, the burden of proof on the affirmative,) not being changed by the mere grade of the crime.

In any prosecution, the *proofs are to follow the allegations*, and *only* what is alleged is to be proved. And under *our statute* no indictment for murder need allege anything about the prisoner's sanity. It is a mere begging of the question to say of sanity: "It is nevertheless a part of the case of the party who *alleges* its existence, and to be made out beyond a reasonable doubt," when the prosecution has *not* made, and is not bound to make *any such allegation*. And if it *proves all it alleges*, it makes out its case, leaving the opposite side to establish its defence.

To dispose, however, of the written requests to charge now made by the prisoner's counsel, (before concluding what I cannot, if I would, avoid saying to you, as to the rule said to be laid down for me,) I now proceed to read those requests and charge as thereby desired, with merely one or two brief words of explanation, which I deem not to vary the tenor of the requests.

1st. That if at the time of the homicide, the prisoner, by reason either of *delirium tremens*, or other partial insanity, believed, (when he was committing the homicide,) that he was fighting with men who were supposed by him to be present;

"and the killing was done *in the fight* he believed to be going on, and as a part of it; and was *thus connected with the delusion*," such delusion would release him from criminal responsibility for the act committed under its influences.

2d. That if by reason of partial insanity, the prisoner, at the time the alleged offence was committed, was laboring under *such a defect of reason as not to be conscious of the real nature and character of the act*, he should be acquitted.

3d. That it is sufficient to constitute the defence that the homicide was the *offspring of insane delusion*, without reference to any other test or criterion.

4th. That it is not necessary, in order to *constitute the defence of insanity*, that the facts *supposed by the prisoner to be true*—but which were untrue, *should have been sufficient, if true, to constitute a defence in law*, to the act committed by the prisoner *under the influence of the delusion*.

5th. That if, *by reason of partial insanity*, the prisoner killed his wife *while he labored under the delusion that he was defending himself in a supposed fight* with persons who were his enemies, he should be acquitted.

6th. That if *upon the whole evidence* in the case, the jury entertain a *reasonable doubt* whether the prisoner *at the time of committing the homicide, was of sound mind and memory, "so far as to be conscious of the real nature and character of the act,"* he should be acquitted.

7th. That a *reasonable doubt* upon the whole evidence, in regard to the *sanity of the prisoner at the time the homicide was committed*, enures to the benefit of the prisoner, and will entitle him to an acquittal. "This limited to his being *so sane as to be conscious of the real nature and character of the act.*"

(Such portions of the foregoing points as are quoted, were added by Judge GOULD.)

Having thus given you the prisoner's views of the case, which commence with taking it for granted that he is *to prove insanity*, and end with claiming the benefit of the *shadow of something not proved*, I return to apply to those requests, and the whole case, the *opinion* given on granting to the prisoner

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a new trial. That opinion cites, as *expressions not without their value*, the unanimous opinion of the fifteen English judges, given by Ch. J. TINDAL, "that the jury ought to be told in all cases, that every man is presumed to be sane, and to possess a sufficient degree of reason to be responsible for his crimes, *until the contrary is proved to their satisfaction*; and that to establish a defence on the ground of insanity, it must be *clearly proved* that at the time of committing the act, the party was laboring under such a defect of reason *from disease of the mind*, as not to know the nature and quality of the act he was doing, or if he did, that he did not know he was doing what was wrong." I do not perceive that the court gave any shadow of dissent from these views. It is, to be sure, added by Mr. Justice BROWN, that "they furnish no guide when the question is shrouded in doubt and obscurity." If by "the question," be meant the question of actual insanity, and that the opinions cited, furnish (in any given case, which is shrouded in doubt and obscurity,) no guide by which a jury can decide the fact of insanity, it is plain enough. And this is the only meaning I can deliberately attach to that remark; since my great respect for that court will not allow me to suppose that it was intended (while not merely *not* overruling, but actually approving those opinions,) to say that sentences so clear and positive furnish *no guide as to the rule of law*, and do not say that the fact of insanity must be *clearly proved* to the satisfaction of the jury; or that those fifteen judges did not hold that it was for the prisoner to "establish his defence on the ground of insanity," by clear proof of it.

Still, gentlemen, whether or not to my feeble judgment the parts of this opinion be reconcilable with each other, I am bound by the ultimate decision, and am not responsible for an inconsistency which perhaps I am under a delusion in supposing that I see. That decision imposes on me the duty of saying to you, that even on this issue the prisoner is entitled to the benefit of any reasonable doubt you may entertain of his guilt, in view of the proofs he has made to you that at the time of committing this crime, (for that he *did the deed is admitted*.)

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he was insane, and therefore not responsible for his act. A reasonable doubt means one that has some real foundation; one that has so much of *substance* that it prevents your minds from being *fully satisfied* upon its subject.

I do not understand that a mere assertion of insanity, a mere *notice* of matter of defence, even now *constitutes a defence*, and compels a jury to do violence to their consciences and acquit in defiance of their oaths. In coming before you as

"A creature, who not prone
And brute as other creatures, but endued
With sanctity of reason, may erect
His stature,"

in coming as a *man*, the prisoner is amenable to the law, unless *he shows* some exemption from it. And so to make that out, that you shall be in uncertainty as to his guilt, he must go farther than an *insinuation*, and excite in your minds something far stronger than a mere *suspicion*. You are not bound even in a capital case, nor are you allowed to refrain from finding a verdict of guilty, because you have not arrived at *absolute certainty*. Nor will you waste your time nor strain your oaths in the worse than useless inquiry whether a conclusion which you *fully believe* to be true, may not *possibly* be erroneous. Absolute certainty on facts not apparent to the senses, belongs not to human minds. It can hardly be predicated of what you see and hear, so liable are even our senses to be deceived. An optical delusion, a feat of legerdemain, defies them. But you are not, therefore, the less bound to render a verdict, and that verdict is to be the one which, on the whole case, after weighing all the evidence, you in your own minds and hearts *are satisfied is true*. If in your own minds you make up a *full belief—come to a definite conclusion*—no consideration of time or of eternity should prevent your saying so by your verdict. You should permit in yourselves no hesitancy to act on your *honest convictions*. No too finely spun web of *apprehension* should prevent your doing your whole duty, and meting out to the public, as well as to the prisoner, *justice*. Both appear before you; and between the two you stand represent-

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ing the majesty of the law—sworn to declare the truth as in your calm judgments, in your hearts, you find it. With no other guide, with no responsibility for the correctness of the rules given to you by the court, with no responsibility for what the law may make the *consequences* of your finding, you will proceed to the discharge of your duty impartially, honestly, *fearlessly*. Face it like every other duty. So meet it that hereafter your own consciences shall not reproach you with having been either unnecessarily severe or criminally weak.

SUPREME COURT.

AMY BILLINGS agt. CLAUDIUS BAKER, PERRY P. BILLINGS
and others.

The acts of 1848 and 1849, "for the protection of estates of married women," *entirely abrogate* the existence of prospective *tenancy by the curtesy*, and were intended to do so. (*See Hurd agt. Cass*, 9 Barb. 366; and *Clark agt. Clark*, 24 Barb. 581, *adverse*.)

The effect of these statutes is, that the useless and ridiculous fiction of "tenancy by the curtesy of England," is abrogated, and no longer remains to disfigure the system of common law, or the republican institutions of this state.

Saratoga Special Term, March, 1858.

MOTION to amend a complaint by striking out the name of Perry P. Billings, as a defendant. The action is for partition of real estate, which came to the plaintiff by inheritance since the act of 1848, amended in 1849, "for the more effectual protection of the property of married women." Perry P. Billings is the husband of the plaintiff, and was made a defendant under the impression that as the husband of the plaintiff, and by the birth of issue, he had an inchoate interest, as tenant by the curtesy. On the trial before the referee, one of the defendants was sworn as a witness, on his own behalf. The plaintiff was

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then advised that her testimony became important in the action in her own behalf, but that she was an incompetent witness by reason of her husband's being a party. Perry P. Billings then conveyed or released all his interest in the said estate, to a third party, "and especially his interest, present and future," as tenant by the curtesy, as husband of Amy Billings, so that he be forever barred of all claim as such tenant. Such third person then released and conveyed all that interest to the plaintiff. She then makes this motion to enable her to be a witness in her own behalf.

H. W. MERRILL, *for plaintiff.*

C. S. LESTER, *for defendants.*

POTTER, Justice. The facts set forth in the moving affidavits, sufficiently show that it would be in furtherance of justice to grant this motion; if the interest of the defendant Perry P. Billings, does not make him a necessary party to the action. If the husband has either a present or a prospective interest, he is a proper and necessary party to the action, and the motion could not be granted. That the husband was in such case at common law, tenant by the curtesy initiate, is certain, and that he is such in regard to all estate owned, or acquired by the wife prior to the statutes of 1848 and 1849, if the marriage was also prior to that time, is equally certain. If those acts have by necessary implication abrogated prospective tenancy by the curtesy, it no longer exists. Tenancy by the curtesy, is, "when a man marries a woman seized at any time during the coverture of an estate of inheritance, in severalty, in coparcenary, or in common, and hath issue by her, born alive, and which might by possibility inherit the same estate as heir to the wife, and the wife dies in the lifetime of the husband, he holds the land during his life, *by the curtesy of England.*" (4 *Kent Com.* 27.) The Revised Statutes (1 *Rev. Stat.* 754, § 20) expressly recognize the existence of this estate, and provide that, "the estate of a husband, as tenant by the curtesy, shall not be affected by any of the provisions of this chapter."

Four things are necessary to constitute this estate, viz: 1st. Marriage. 2d. Actual seizin of the wife. 3d. Issue born alive; and 4th. Death of the wife. (4 *Kent Com.* 29.) The common law vested this estate in the husband *immediately upon the birth of a child.* (2 *Black. Com.* 127.)

If the reasons for the introduction of this peculiar feature of the common law called "tenancy by the curtesy," in estates in land, have ceased to exist; if in practice the law fails to be useful; or if it had become an evil, or is inapplicable to our American system of law; it presented a reason, perhaps a necessity, for a *remedial act* to abrogate it—and such remedial statute must then be construed with reference to a condition of things thus presented. One of the reasons for the introduction of this estate into the English system, was that the husband being the natural guardian of his child, was entitled to the profits of the land *in order to maintain the child*; but a more prominent and important idea of the system was, the reason that then existed in England, in regard to all estates in land under the feudal law, to wit: that the husband having become dignified by having an interest in lands, was bound to do homage to his superior lord; and the interest being once vested in him, it was the policy of the feudal system not to suffer it to determine during the life of the husband, as otherwise the lord might lose the homage that was his due from the land. *To this estate the husband never had any natural right.* (*Bac. Abr. Tenant by the Curtesy.*)

Sir J. JEKYL says: "This estate has no *moral foundation* to support it." (*Green. Cruise, tit. 5, § 3.*) Crabb, an English writer, says: "The term *curtesy* is derived from *courtesie*, latin *curialitas*; to signify suavity or urbanity, to denote that the custom sprung from *favor* to the husband, rather than from any *right*." By thus becoming the vassal or tenant of his superior lord, he was permitted "*by the curtesy of England*," to attend his lord's court, or *curtis*, (as it was called,) and to do him homage, by reason of having become the husband of a wife who had died possessed of an estate in lands after issue born. Such were the reasons for the introduction of such a title to lands

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into the law of England. This common law was adopted into our system in this state, by the 35th section of the constitution of 1777. This examination of its history, and the reasons of its adoption, seemed to be necessary in order to ascertain—first, whether such reasons continue to exist; and next, the applicability of such a law to our own local system; and lastly, whether these causes may not have had an influence in determining the *intent* of the legislature, either in continuing or in abrogating this feature of law in regard to real estate, by the acts of 1848 and 1849, above referred to.

There is no doubt that the legislature had the power either to modify or abrogate this *estate* at their pleasure, if it was regarded as public policy so to do. It was so held in *Sleight* agt. *Reed*, (18 *Barb.* 165,) and *Moore* agt. *Mayor of New-York*, (4 *Seld.* 114.) “It is not,” says DENIO, J., “a part of the marriage contract which cannot be affected or impaired by statute, but it stands on the foundation of positive law, as one of the institutions of the country.” From this, we see, 1st. That the legislature had power to abrogate this estate as to all prospective cases. 2d. That every reason for the introduction of this estate into our system of law, except only that of *the maintenance and support of the children*, is entirely inapplicable to the public policy of this country, and to the institutions of this state. And 3d. That the provisions contained in those acts, were intended to introduce a most important, if not an entire change in the existing law of this state in that particular. The question then is, have future estates of tenancy by the curtesy, been abrogated by those acts?

The answer to this question depends mainly upon the construction to be given to (what seems to be) the very plain language of the act. In determining such construction, we must be guided by those sound rules of interpretation, which long experience and the settled wisdom of the courts have uniformly approved. This, as has been said, is to be regarded as a *remedial statute*, and its language is to be so construed as to give effect to the end the legislature had in view, and if possible to prevent a failure of the remedy intended.

(1 *Kent Com.* 465.) What then, was the mischief felt, that was the occasion of, or created the necessity for this statute? What was the object intended to be effected by it? Experience had shown, that the only sensible reason for the introduction of this tenure into real estates, to wit: *the maintenance of the children*, had sadly failed of its object. The estate was not only alienable, but was also *liable to the payment of the husband's debts*. And it was found that in too large a proportion of cases, worthless, spendthrift and intemperate husbands, instead of using the estates intended for the support, maintenance and education of their children, exhausted them upon *themselves*, during their own lives, too frequently leaving the children objects of public care. What was the remedy? Let then this statute first speak for itself. The first section of the act of 1848, provides for the estates of females who may thereafter marry. It provides that her estate, real and personal, and the rents, issues and profits thereof, *shall not be subject to the disposal of her (future) husband, nor be liable for his debts, and shall continue her sole and separate property, as if she were a single female*.

The second section was intended to carry out the same provision as the first, in relation to estates of *married* women. It has been already judicially passed upon in various reported decisions; but its application to the property of the wife who was married at the time of the passage of the above act, is not a question necessary to be examined here, except so far as it goes to show the *intent* of the legislature.

The third section as amended in 1849, provides that any married female may take by inheritance, or by gift, grant, devise or bequest, (from any person other than her husband,) and hold *to her sole and separate use*, and convey and devise real and personal property, *and any interest or estate therein*, and the rents, issues and profits thereof, *in the same manner and with like effect as if she was unmarried*, and the same shall not be *subject to the disposal of her husband, nor liable for his debts*.

The next section of the act of 1849, authorizes trustees who hold estates in trust for married women, to convey such estate

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to them, subject to certain regulations, for their *sole and separate use and benefit*. It might here be sufficient to inquire whether the estate of a female before marriage is not absolutely hers for life, forever—without condition—without qualification—and subject by law to be inherited directly from her by heirs? It is so, beyond all question; whatever estate she then has in it, by the first section of the act of 1848, *shall continue her sole and separate property, as if she were a single female*. This could not be, if any person can acquire an *interest* in it. If the intent of a statute is to be construed in the same manner as the intent in a devise or settlement, the case of *Heath agt. Greenbank*, (3 *Atk.* 695,) is in point. The testator in that case, devised an estate to trustees, “to and for the sole and separate use of his daughter Mary, wife of William Winsmore, during her life and at her disposal, and not to be subject to the debts, power or control of her husband.” And, though a husband was entitled to a curtesy in a trust estate, yet Lord HARDWICKE said: “The father, whose estate it was, has made the daughter a *feme sole*, and has given the profits to her *separate use*, therefore, what seizin could he, (the husband,) have during the coverture? *He could neither come at the possession, nor the profits*. To admit that the husband was seized, would be directly contrary to the father’s *intent*.” And he held that the husband could not have curtesy. What single quality or incident that constitutes a tenancy by the curtesy, is left, or remains to the husband under this act? A tenancy by the curtesy, vested on the birth of a child. (2 *Black. Com.* 127; 2 *Cow. R.* 440.) This quality is now destroyed. It was an estate liable to be sold on execution, to pay the husband’s debts. (*Schermerhorn agt. Clute*, 2 *Cow. R.* 439.) This quality is also destroyed. The husband as tenant by the curtesy, could alien and convey such estate. He has no such power now. One of the requisites to constitute this estate was a marriage. This statute cuts off this constituent in its creation in advance, and expressly declares the wife *shall continue to hold to her sole and separate use, as if she were a single female*. So long as she lives, therefore, the marriage in respect to this estate, does him no

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good; for the estate cannot begin during her life. Lord Coke says: "Albeit the estate be not *consummate* till the death of the wife, yet the estate hath a *beginning in the life of the wife*." (*Co. Lit.* 30 a.) And when she is dead, as there has been no such estate to begin, at her death there is none to be consummated. Actual *seizin* of the wife was another constituent quality of this estate. By such *seizin* of the wife, the husband became seized of *his* interest therein. This quality is also abrogated. Formerly the *seizin* of the wife, became the *seizin* of the husband and wife, now it is a *seizin* for herself alone. By the provisions of this statute, there is not left to the husband one quality that is required to constitute a tenant by the curtesy initiate, nor one incident of the estate that he can enjoy. How then, can it exist? It may be said, indeed, that since the passage of that act, so far as regards all prospective estates, a tenancy by the curtesy initiate is a legal impossibility. Death of the wife changed the tenure from a tenancy by the curtesy initiate, to a tenancy by the curtesy consummate. Now there is no such tenure to be consummated or changed. As a tenancy by the curtesy *initiate*, cannot exist or begin, how can the latter estate be consummated from it? How is it *now* to be constituted? If it *can* now be constituted, the legal definitions of its character must be changed, new qualities must enter into its composition, and a new definition must be prepared to describe it. And for what purpose, under our system of laws, and with our republican institutions? What one single argument can now be produced in favor of its usefulness, as a reason for retaining it? We have here no lords to whom we are bound to render homage. We are all equal peers. A citizen here receives no new dignity by holding an interest in lands. The maintenance and support of the child, which was a reason for the introduction of such an estate, is more certain now by directly inheriting from the mother, than to be dependent upon a father, whose dignity and importance consist in the fact of having been the husband of a wife who had an estate in lands.

The language of this act is entirely inconsistent with the

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idea that there is a tenancy for life existing in another person. Is there any such tenure or right as tenancy by the curtesy, attached to the estate of a *single* female? And does not this statute in the most express language declare, that the wife holds this estate, "as if she were a single female?" How then does he acquire a right in it? Does not the same statute declare, that this estate, "*shall not be subject to the disposal of her husband?*" What estate? Not his estate, but her estate; he has none in it. Is this estate, which was hers absolutely, and which the statute says shall so continue, limited to her for her life? By what law? The legislature had no power to limit an estate that was absolutely hers. How then, does the husband acquire any rights to it? By the omission to give it to anybody else? Are estates to land, acquired by omissions in this way? He acquires no statute right to it. *He has no natural right to it* by common law. (2 *Bac. Ab. title Tenant by the Curtesy.*)

The effect of this statute then is, that the useless and ridiculous fiction of "*tenancy by the curtesy of England,*" is abrogated, and no longer remains to disfigure the system of common law, or the republican institutions of this state. Nor is the argument ended here. There are negative words enough in this statute alone, to settle this question of intent, without going farther, to wit: "This estate (of the wife) *shall not be subject to the disposal of her husband.*" If after her death, it becomes his by this English fiction, would it not in the very face of the statute, be *subject to his disposal?* "*Nor be liable to his debts,*" says the statute. If he has the use of it for his life, could he not pay his debts with it? Is this old remnant of an obsolete system still to be regarded as stronger than the negative language of an applicable, remedial statute? If this excrescence of another age was regarded as an evil by the legislature, is it to be supposed that they stopped half way, when attempting to apply the remedy of abrogation?

I think it more important at this day, that the courts should adhere strictly to the sensibly expressed intention of the legislature, than that they should permit old maxims applicable

only to ancient observances of an obsolete system of feudal tenures, to control the construction of our own abrogating statutes. Our rights, under remedial statutes, ought to rest upon a surer basis than this. Even in England, it was held, that in case of a *remedial* act, everything is to be done in the advancement of the remedy that can be given consistently with any construction that can be put upon it. (*Johnes* agt. *Johnes*, 3 *Dow*. 15.) Nor is the view I have taken of the construction of this statute, without high authority. In *Westervelt* agt. *Gregg*, (2 *Kern*. 211,) DENIO, J., said: "I am constrained to believe that the true meaning of the section is, (§ 2 act of 1848,) that all property which the wife owned at the time of the marriage, and that all such as she had acquired by gift, devise or otherwise, during the coverture, but before the passing of the act, should thereafter be deemed to be vested in her as though she was a *feme sole*, to the exclusion of any title which by the pre-existing laws the husband had acquired in it, by virtue of the marriage relation." To understand the whole intent of the legislature, the whole three sections of the act of 1848, must be read together, and by such a reading no doubt can remain of the intent. We are at least bound to suppose, that the legislature employed in this act such language as would most directly and aptly express the object they had in view; that they intended what they said, and the court, instead of looking beyond the act for a constitution to limit or cripple its remedial intent, will best discharge their duty by giving to words that obvious meaning, which is consistent with the common understanding of them. Why, if it was not the clear intent of the legislature to abrogate the tenancy by the curtesy, did they by section 2 of the act of 1849, authorize trustees holding estates for married women, to convey them to such married women? It was doubtless only upon the theory that she was to be *sole owner*. If by such conveyance, the husband acquired a vested interest in the estate, the very object of the trust estate might be thus defeated. I cannot be made to doubt, upon the considerations above expressed, that the legislature intended to make, and did make, an entire and radical change in the law applicable to the

condition of things as they exist here ; a change demanded by the highest considerations of public policy, dictated by demands of the purest benevolence, and resting upon a sound basis of practical good sense. It is a consistent and reasonable statute, suited to the genius and spirit of the age, and to the wants and institutions of a country whose laws lay claim to the basis of equality of rights. It is entitled to fair judicial construction, having reference to the existing mischief, and to the intended remedy, divested of the clogs to progress, by a veneration for any of the ancient relics of feudalism. It would fail of being the remedial statute intended, if it did not remove the unjust disabilities of the wife, arising from coverture, and substitute in some degree, a sensible, living practical equality, for the exploded fiction that the legal existence of woman, as well as her estate, is merged in a husband by marriage ; nor only that, but that her own subsistence for her life, as well as the support and maintenance of her children after her death, of an estate derived perhaps solely from her, are put at more than the peril of loss, that a husband, whether worthy or worthless, may be dignified by its control. We have already seen that the reasons for its introduction into a system of law, no longer exist. There is found no such superiority in the husband in regard to a provident management of estates, that demands its longer continuance.

Divesting then, this question as I do, of all reference to common law tenures, which were intended to be abrogated, and construing this remedial statute by the light of its own plain intent as manifested in its clear and express language, the parties in interest are restored to their natural rights. What are they ? The right of independent existence, the right to enjoy property, and the right to a certain support and maintenance of her children, are as strong by nature, and have as high a claim to consideration and protection upon public justice, as the claims of the husband's superior dignity. The very spirit of our government is, and it should be of our system of laws, that the rights of *each* citizen to support and protection, whether infant or adult, whether male or female, husband or

wife, shall stand upon an *equality*, and the power of any one so to control the rights or interests of another, as to annihilate or destroy them, should be subject to the control of law. The courts for a long period, had been gradually relaxing the rigid rules of law, in order to aid married women in the protection of their estates, against improvident husbands. And equity, especially, has been prompt to uphold marriage settlements, devises and conveyances in *trust* for them until "*a wife's equity*," had become an institution of the country. (*Sleight agt. Reed*, 18 Barb. 162.) And the civil law, still more reasonable, ever regarded the husband and wife as being separate and distinct persons in regard to their estates. (2 *Story Eq. Jur.* § 1868.) And as authority to sustain the interpretation of this statute which I have given, I find it laid down as a rule, that even in legal estates, unless the husband had possession during the coverture, so as to be in the receipt of the rents and profits, he was not entitled to curtesy. (1 *Bright on Husband and Wife*, 120.) So too, in the settlements of estates upon the wife, when the intention manifestly appears in the deed of settlement, that the husband should have no interest in the estates so settled upon the wife, she is converted into a *feme sole* during her life. In such cases, whether the equitable inheritance devolve to her as heir, or by limitation immediately, or after intermediate limitations, her husband will not be entitled to curtesy, and if it be a trust to be carried into effect in equity, the court will so model the decree as to prevent curtesy. (1 *Bright on Husband and Wife*, 137.)

With all my veneration for the common law, whenever its existence is found to be inconsistent, not only with the just and equal rights of a class of citizens, but in direct conflict with our remedial statutes, when I find its existence has neither a *natural* nor a *moral* basis to sustain it, I must find a more solid reason for its retention, than the ancient custom of rendering homage to a superior lord, in order to create any reverential awe that shall restrain from an examination as to its usefulness, or hesitation about construing a statute *sensibly*, for fear of derogating from the ancient glory of that system.

I have come to the conclusion above expressed, but I admit not without much embarrassment, on account of the highly respectable authorities deciding the same question the other way. The case of *Hurd agt. Coss*, (9 Barb. 366,) per MASON, J., at special term, and *Clark agt. Clark*, (24 Barb. 581,) per MARVIN, J., also at special term, the latter, however, basing his opinion mainly on the former. But what is a little singular, the last authority cited by Justice MARVIN, is directly against the conclusion he himself arrives at, to wit: *Crabb on Real Property*, § 1106. In his conclusion, he also says: "If the legislature had intended to deprive the husband of his rights by the curtesy, when the wife had not conveyed or devised the estate, it should have so expressly declared in the act." With all deference, I think if the legislature after passing an act, which in its express terms did take it away, had intended still to retain it in the system, *they would have said so*, as they did in the 1st Rev. Stat. 754, § 20, in which such a reservation seemed to be necessary, in order to secure it from abrogation. I find no reported general term decisions directly upon the question. I find nothing in the case of *Colvin agt. Carrier*, (22 Barb. 372,) in conflict with the views I have expressed, but on the contrary, much to sustain them; that case holds that the estates of the wife under the acts of 1848 and 1849, are her separate legal estates. The case of *Sleight agt. Reed*, (18 Barb. 159, 164, 165,) I regard also as sustaining my views. The case of *Shumway agt. Cooper*, (16 Barb. 560,) is also cited by the defendant's counsel on their side. This is a general term decision in the 5th district. I have read the very able opinion of Justice ALLEN, in that case, and find that this question did not arise there at all. It was the rights of a husband under the statute of *distributions*, not the common law rights of a tenant by the curtesy, that were discussed in that case. That statute gives the husband as administrator, the right to his wife's personal estate. (2 Rev. Stat. 98, § 86, (79).) That statute, it was held in that case, was not *repealed* by the acts of 1848 and 1849, but was modified in this particular, that the wife possessed the power during her life, to dispose of her personal estate, which

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if she failed to do, the husband took as before under the statute. There is a case, (*Benedict agt. Seymour*, 11 *How. Pr. R* 176, 177,) which so far as it goes, sustains my views, though the question of tenancy by the curtesy, did not directly arise in the case. The conveyance from Perry P. Billings to his wife would be ineffectual to change his interest if he ever had any. By the plaintiff's getting the whole estate again, his rights would again attach.

The motion must be granted on the payment of costs of opposing the motion, it being a motion for a favor.

NEW-YORK COMMON PLEAS.

ROBERT MCC. BUTT and others agt. JAMES FRENCHÉ.

No appeal lies from an *order* made by a single justice of the marine court, to the general term of that court.

The appellate jurisdiction of the general term of that court, is confined exclusively to *judgments*.

MOTION made on the part of the defendant to stay the supplemental proceedings on the judgment recovered in the marine court, on the ground that the defendant had appealed from the order overruling the demurrer, to the general term of that court.

C. BAINBRIDGE SMITH, *for the plaintiffs*.

JOHN FITCH, *for the defendant*.

BRADY, Judge. Appeals may be taken from the judgment entered by the direction of a single justice of the marine court, to the justices thereof, at a general term, in the same manner and with the like effect, as appeals in the supreme court, from the decision of a single judge to the general term. (*Laus* 1853, p. 1165.) The manner relates to the mode of proceeding in effecting an appeal, the notice and security to

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be given; the effect relates to consequences produced by the appeal, as under what circumstances it shall operate to stay proceedings. (*The People ex rel. Debenetti* agt. *The Clerk of the N. Y. Marine Court*, 13 *How.* 280.) The appeal from the judgment of a single justice to the general term of the supreme court, is regulated by section 348 of the Code, and relates exclusively to judgments. By that section, it is expressly provided that such appeal when taken, does not stay the proceedings, unless security be given as upon an appeal to the court of appeals. The defendant admits that on the appeal taken to the general term of the marine court, no security was given, and it is, therefore, clear that he is not entitled to any stay of proceedings in this court, on the judgment acquired by filing a transcript from the court below. (*Code*, § 68.) It also appears from the moving papers, that the appeal to the general term of the marine court, was from an order, and if by this is meant some proceeding other than a judgment by a single justice, the appeal was improperly taken. The appellate jurisdiction of the general term of the marine court, is confined to judgments; (*Statute* 1853; *The People* agt. *The Clerk of the Marine Court*; *Code*, § 348, *supra*;) and a judgment is defined by the Code, (§ 245,) to be the final determination of the rights of the parties in the action; while by section 400, every direction of a court or judge, made or entered in writing, and not included in a judgment, is denominated an order. Stay, on the ground that appeal has been taken, refused for the reasons stated.

SUPREME COURT.

ALLISON LEWIS agt. JOHN M. WOODRUFF.

An attorney's authority under his simple retainer, should be held as between the plaintiff and defendant, not to allow him to satisfy the judgment, except upon actual payment in money of the full amount.

The attorney for the plaintiff in this case, and the defendant, both acting in good faith, as to the supposed authority of the attorney, under his general retainer, to receive payment and discharge the judgment by a satisfaction piece within two years from the entry of judgment, settled the judgment in this shape :

The attorney made an agreement with the defendant, under which the defendant delivered to the attorney a quantity of liquors, amounting, as they valued them, to a large portion of the judgment, and paid the balance of the judgment in money, and the attorney executed and acknowledged a satisfaction piece of the judgment, as upon payment in full ; upon which the judgment was discharged of record.

The attorney immediately shipped the liquors to the plaintiff, at his residence in another state ; but the plaintiff refused to receive them, and repudiated the arrangement as unauthorized ; and (as is too frequently the case) the attorney being insolvent, the plaintiff moved to vacate the satisfaction of the judgment, which was granted.

Erie General Term, 1858.

APPEAL from an order made at special term vacating the satisfaction of the judgment entered in this action.

On the 30th day of July, 1856, the plaintiff recovered judgment in this court, against the defendant, for the sum of \$974.90 damages and costs. The action was prosecuted by E. C. Robbins, an attorney of this court, on behalf of the plaintiff, who acted in prosecuting the same, and in the subsequent settlement and satisfaction of the judgment, under his general retainer as attorney, and without any other or special authority.

On the 18th day of August, 1856, the attorney for plaintiff made an agreement with the defendant, under which the defendant delivered to the attorney, a quantity of liquors valued at \$758, and paid the balance of the judgment in money, and

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the attorney executed and acknowledged a satisfaction piece of the judgment as upon payment in full; upon filing which, the judgment was discharged of record.

The attorney immediately shipped the liquors to the plaintiff, at Milwaukee, where he resided; but the plaintiff refused to receive them, and repudiated the arrangement as unauthorized, and now moves to vacate the satisfaction, and restore the judgment. The money has not been paid over to plaintiff. It appears that the attorney and defendant in making the arrangement, acted in good faith; the former supposing himself authorized under his general retainer, to settle and discharge the judgment on the terms stated, and the latter having no notice that the attorney was not authorized. The attorney is shown to be insolvent, and the delay in making the motion is satisfactorily excused.

R. L. BURROWS, *for appellant.*

E. C. SPRAGUE, *for respondent.*

By the court—DAVIS, Justice. An attorney, by virtue of his general retainer, was authorized at common law to sue out execution, receive the moneys collected thereon, and enter satisfaction *after payment*, so long as the judgment remained in force; which was a year and a day from its date, and such further time as the process should be continued. (3 *Thomas' Coke on Litt.* 321, note C.; 2 *Inst.* 378; *Lee* agt. *Ayrton*, *Peake*, 119; *Russel* agt. *Palmer*, 2 *Wils.* 325; 4 *Burr.* 2061; and see *Livingston Law Register* No. 1, Vol. IV, pp. 21 and 22, and notes, where the authorities are fully collected.)

The period during which this power continued was indefinite and uncertain, depending on the particular circumstances of each case. If no execution were sued out, it expired with the year and a day, because then the judgment was presumed to be satisfied, and a *scire facias* was necessary to revive it; and for this, a fresh authority to the attorney was required. (2 *Lord Raym.* 1048; *Cro. Eliz.* 177.) If execution were sued out within the year and a day, continuances of

the process could be entered on the roll indefinitely, and the power of the attorney to satisfy on payment, carried along with such continuances.

It was to remove this uncertainty as to the period within which the attorney might acknowledge satisfaction of the judgment, and not to alter the terms upon which he could exercise that power, (so far, at least, as the defendant in the judgment is concerned,) that the legislature of this state fixed the period at two years from the filing of the record of judgment by § 24 of art. 2, part 3, tit. 4, chap. VI of the Revised Statutes. (2 R. S. p. 262.)

The section cited is by no means perspicuous in its language or easy of construction. It provides that "such acknowledgment may also be made by the attorney on record of the party in whose favor the same was rendered, within two years after the filing of the record of such judgment, in the same manner and with like effect as if made by such party himself; but such satisfaction shall not be conclusive against the party in whose favor the judgment was rendered, in respect to any person to whom actual notice of the revocation of the authority of such attorney shall have been given before any payment on such judgment shall have been made; or before any purchase of property bound by such judgment shall have been effected."

It was argued with much earnestness and ability by the counsel for the appellant, that the phrase "*in the same manner, and with the like effect as if made by such party himself*," coupled as it is with the exception expressed in the section, must be held to confer unlimited power on the attorney in respect to the satisfaction of the judgment, and to make his act conclusive upon the plaintiff. It must be confessed there seems to be great force in the position, and so far as relates to the authority of the clerk to act upon the acknowledgment in cancelling the docket, and to subsequent purchasers without notice, of property that would otherwise have been bound by the judgment, the position is impregnable.

But the question here arises between the plaintiff and de-

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defendant in the judgment; and the point is, as to the terms upon which the attorney may satisfy the judgment; so as to conclude his client from inquiring into and avoiding the act. Upon *actual payment* of the judgment, to the attorney, at any time within two years, and before notice of revocation of his authority, his acknowledgment is conclusive upon the plaintiff on record, although in point of fact, the power of the attorney may have been wholly revoked; but it is clear under this section that payment to the attorney, and his acknowledgment of satisfaction after notice to the party making such payment of revocation of his power, would be wholly ineffective as against the plaintiff in the judgment, and would be vacated by the court. There is no injustice in holding, as between the defendant and the plaintiff in the judgment, that the former shall be put to inquire whether the attorney in satisfying the judgment, *without actual payment*, is acting upon his general retainer, or under a special power; nor if he omits to do so, in holding him to know the character and extent of the attorney's powers under the general retainer, and to take the discharge subject to the ratification or disaffirmance of the plaintiff, if the attorney has exceeded his powers. Upon actual payment in money, of the whole judgment, without notice of revocation, he is fully protected; upon payment of less, or in some manner which the general retainer does not authorize the attorney to consent to, or receive, the defendant must take the consequences of dealing with an agent who is transcending his warrant. Any other rule might lead to the grossest injustice, and the most flagrant abuse of power on the part of attorneys, which it is not necessary to illustrate by examples.

It becomes material then, to inquire whether the general retainer of an attorney confers authority to satisfy the judgment he recovers, upon any other terms than *payment in full in money*, so as to discharge the defendant.

In no case in this state has this precise question been adjudicated. In *Crary agt. Turner*, (6 *Johnson*, 51,) the point was not at all involved; and all that was intimated on the subject

is outside of the case before the court, and evidently without examination.

In *Jackson agt. Bartlett*, the question was as to the power of an attorney to discharge the defendant from arrest on *ca. sa.*, without payment; and the court say that "he had no authority from his general character as attorney, to discharge the defendant from execution on *ca. sa.*, until the money was paid. It was a disputed point as early as the case of *Payne agt. Chute*, (1 *Rolle Rep.* 365,) whether an attorney could acknowledge satisfaction without receiving the money. COKE and DODRIDGE differed upon that point; and there is no case in which that authority has been adjudged to belong to him, and it is against the nature and limitation of his trust."

Kellogg agt. Gilbert, (10 *John.* 220,) involved the same point, that is the power to discharge on *ca. sa.*, and re-affirms the rule laid down in *Jackson agt. Bartlett*. *Gorham agt. Gale*, (7 *Cowen*, 744,) merely discusses the general authority of the attorney to direct the mode of enforcing the execution.

In *Simonton agt. Barrell*, (21 *Wend.* 362,) COWEN, J., reiterates the doctrine of *Kellogg agt. Gilbert*, and declares it well settled that the attorney for "the plaintiff has no power to allow a discharge (from *ca. sa.*) in virtue of his general authority, without the payment of the money."

In *Benedict agt. Smith*, (10 *Paige*, 162,) the execution was levied on property sufficient to satisfy the judgment, and the attorney took security for the amount, and discharged the lien of the execution, agreeing that it should be returned unsatisfied. The chancellor held that the defendant was bound to know that the attorney went beyond the authority he possessed by virtue of his general retainer, and that the plaintiff in the execution might have repudiated his acts and enforced the lien. He was held, however, to have ratified the act of the attorney by receiving and appropriating the securities.

The chancellor intimates that it is a question of some importance, whether an attorney employed to collect a doubtful debt, may not, after judgment, receive a part of the debt, and discharge the lien of the judgment, upon receiving

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security for the payment of the residue of the debt; but he gives no opinion upon the point, *doubtless because it was not in the case before him.*

The drift of these and all the other authorities touching the subject in this state, must be conceded to be against the power of the attorney to satisfy a judgment without payment in money; and such, it is safe to assert, is the general impression.

In other states, the point seems to have been more definitely passed upon.

In *Lewis agt. Gamage*, (1 *Pickering*, 347,) it was decided that the attorney cannot discharge a debtor from execution on payment of less than the amount of the judgment. In *Smock agt. Dade*, (5 *Randolph*, 639,) it was held that the attorney cannot receive a bond of a third party in discharge of the judgment.

In *Hustin agt. Mitchell*, (14 *S. & R.*) the supreme court of Pennsylvania say that an attorney cannot compromise the judgment by taking land instead of money. The point, it is true, was not directly involved in the case, because the person making the compromise was not the attorney of record; but the court treat the question as though he occupied that relation. And in *The Commissioners of Accounts agt. Rose*, (1 *Desaus.* 469,) it is held, that to authorize an attorney to discharge a money bond in his hands for collection, he must actually receive the money, and that "an ideal payment, or the receipt of anything in lieu of it, will not bind his client."

No authority is cited by counsel, nor has any fallen under the observation of the court, in which a contrary opinion has been expressed; and from those referred to, it would seem to be the prevailing doctrine of the courts, that the payment authorizing the attorney under his general retainer to satisfy the judgment, must be of money.

If the attorney has power to take property in lieu of money, it follows that his valuation of the property in cases free from collusion, is conclusive upon the plaintiff; and that the plaintiff must take the property from him, simply because the authorized act of his agent is his act. A client, therefore,

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who seeks to collect a demand on which he expects money only, may suddenly find himself the owner of property least desirable to him. A radical opponent of slavery with a southern debt, may, through the instrumentality of his attorney, find himself a slaveholder against his conscientious notions of right; or an ultra temperance man become the owner of an invoice of liquors, which his conscience will neither allow him to drink or to sell. Nor could the plaintiff protect himself against such consequences, except by special notice to the defendant; because if the general retainer of the attorney clothes him with power to take the property, special instructions to him would not limit the authority, except as against those to whom notice of the instructions was brought home. The attorney might be liable for a breach of his instructions, but the defendant would be discharged.

It is a safer rule for all parties, that the attorney's authority under his simple retainer, should be held as between the plaintiff and defendant not to allow him to satisfy the judgment, except *upon actual payment in money of the full amount*.

The satisfaction in this case, was, therefore, without authority, and the vacatur was properly ordered.

The order of the special term is therefore affirmed, neither party to have costs on this appeal.

SUPERIOR COURT.

JOHN F. BUTTERWORTH, Receiver, &c., of the Island City
Bank agt. EDWARD FOX.

The novel question was presented in this case, whether a defendant sued by a receiver of a bank upon his promissory note payable to the bank, could set up as a defence or counter claim, that the note became due before the receiver was appointed, and that the bank, at that time, held, as collateral security for the payment of the note, forty shares of the capital stock of the bank, owned

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by the defendant, which at par was worth more than the amount of the note, and still retained such stock; and that said bank afterwards, by fraud and speculation of its authorized agents, misapplied the assets of the bank, and by its own acts so depreciated and damaged such security, and appropriated its value to their own use, that the security became of no value to the defendant or any third person?

Held, that the character of the defendant as a stockholder, and his relations to the company as such, were not extinguished by his becoming a debtor; the stock, until sold by the bank under the 6th section of the statute, (1 R. S. 591,) continued his own.

The identification of the individual stockholders in the artificial body corporate, is logically inconsistent with the idea of a suit by one of them against the body; as much so as an action by one partner against the firm for the speculation or frauds, or gross neglect of his copartners. The wrong is redressed upon a dissolution, and in stating the accounts among themselves.

But where the allegation is, that it was through the agents of the company, that the frauds were committed, then there is something tangible and practical. A stockholder who has been injured by the fraud, culpable neglect of duty, or a violation of provisions of law, has an ample remedy against the director or agent whose acts or omissions have produced his loss.

Held, that there were considerations of a general nature connected with the question, in this case, very similar to those which lie at the foundation of the rules forbidding a dealer with a corporation from impeaching its corporate existence, or the validity of its transactions with him. They should teach the courts the utmost caution in dealing with a claim, the novelty of which induces a distrust of its legality. Demurrer to answer allowed.

Special Term, March, 1858.

DEMURRER to one defence set up in an answer.

C. A. PEABODY, *for plaintiff.*

A. MATHEWS, *for defendant*, who insisted,

First. The note in suit was due before the appointment of the receiver, and the relative rights and obligations of the defendant and the bank were fixed, and could not be changed by such appointment.

I. The receiver has no other powers as respects this cause of action than a common law assignee. (4th ed., 2 Rev. Stat. p. 469, § 68; *Laws of 1849, chap. 226, § 11*; 6 *Paige R.* 499.)

Second. The bank being the creditor, and having wilfully destroyed the collateral security hypothecated with the note

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in suit, the defendant is equitably entitled to have the note cancelled. (*Thayer* agt. *Ward*, 4 *Johns. Ch. Rep.* 130; 1 *Story Eq. Jurisp.* § 826, p. 351; *Ex parte Mure*, 2 *Cox*, 68; *Williams* agt. *Price*, 1 *Sim. & Stu. R.* 581.)

I. After the transfer to the bank, of the stock, the defendant became a mere debtor, and no longer a stockholder as between him and the bank.

Third. Any loss sustained by the defendant through the destruction of his securities, is a proper claim against the bank, and its receiver as its representative, by way of counter claim against the cause of action sued upon, and is a claim arising on contract. (*Seaman* agt. *Keene*, 15 *Barb. S. C. R.* 454; *Reed* agt. *Bank of Newburgh*, 1 *Paige R.* 215; *Gay* agt. *Gay*, 10 *Paige R.* 369; *Barber* agt. *Spence*, 11 *Paige R.* 517.)

HOFFMAN, Justice. The complaint set forth that the defendant made his promissory note dated the 29th day of July, 1857, whereby he promised to pay, thirty days after date, to the Island City Bank, for value received, the sum of \$800, and delivered the same to the said bank.

It states the appointment of the plaintiff as receiver of such bank, by an order of the supreme court made pursuant to the act "to enforce the responsibility of stockholders in certain banking corporations and associations, and to provide for prompt payment of demands against such corporations and associations," passed April 5th, 1849; that the note in question is part of the property of such bank, which passed to him by virtue of such order; that he is now the lawful holder and owner thereof, and that the same is unpaid.

The portion of the answer demurred to, is as follows:

"As a second defence he says, that when said note was made and delivered to the said Island City Bank, said bank held as collateral security therefor, received from this defendant, forty shares of the capital stock of said bank of the par value of \$1,000, and more than sufficient to have paid and satisfied said note in full, and still retains the same; and that said bank afterwards, by fraud and speculation of its authorized agent,

misapplied the assets of the bank, and by its own acts so depreciated and damaged such security, and appropriated its value to their own use, that the said security became of no value to the defendant or any third person, and of great damage to the defendant, insomuch that the plaintiff under a proceeding in the supreme court, is seeking to charge the defendant as a stockholder of the said bank, under the provisions of the statute referred to in the complaint, to the whole amount of the par value of said stock.

To this part of the answer the plaintiff demurs.

First. For that the matters stated therein do not constitute a counter claim or defence.

Second. That the matters of said defence therein alleged, do not arise out of the contract or transaction set forth in the complaint, as the foundation of the plaintiff's claim, and are not connected with the subject of the action; nor do they arise on contract.

Third. The facts stated do not constitute a cause of action against the plaintiff or the bank, or any one whom the plaintiff represents.

Now, the theory of this defence presents at the first blush, this striking feature. The stock which the defendant has deposited, has been diminished in value by the act of the company. What is the company? The aggregate of the corporators and stockholders; and he is one of them. The ideal of the corporation is as much represented by him, as by any other, or number of others. "All the individuals composing a corporation, and their successors, are considered in law as but one moral person, capable, under an artificial form of taking and conveying property, contracting debts, and performing duties, and of enjoying a variety of civil and political rights." (*Kent, Vol. II, p. 267.*) This identification of the individuals in the artificial body, is logically inconsistent with the idea of a suit by one of them against the body.

To leave this, perhaps an abstraction, no instance, I presume, has ever occurred of a suit of this peculiar character, any more than an action by one partner against the firm for the

peculation, frauds, or gross neglect of his copartners. The wrong is redressed upon a dissolution, and in stating the accounts among themselves.

The moment we leave this view of the case, and look at the defence, coupled with the allegation that it was through the agents, that the frauds were committed, we reach something tangible and practical. A stockholder who has been injured by the fraud, culpable neglect of duty, or a violation of provisions of law, has an ample remedy against the director or agent whose acts or omissions have produced his loss. This is given him, not only under long settled rules of law, especially in a court of equity, but also in a great variety of cases by the 18th section of the general act as to moneyed corporations. (1 *R. S.* 591.)

It is, I think, impossible to consider that the character of the defendant as a stockholder, and his relations to the company as such, were extinguished by his becoming a debtor; the stock, until sold by the bank, under the 6th section of the statute before referred to, (1 *R. S.* 591,) continued his own.

The authorities, therefore, which the learned counsel has cited as to the duty of a creditor to preserve, and even to make available all securities placed in his power by the debtor, appear to me inapplicable. (*Williams agt. Price*, 1 *Sim. & Stu. R.* 581; *Hayer agt. Ward*, 4 *John. Ch. Rep.* 123; *Ex parte Mure*, 2 *Cox Cas.* 43.) The company could not be under such obligations to him in relation to its own stock, for the reasons before stated. The responsibility of an agent remains unaffected.

The important case of *The National Exchange Company agt. Duer*, (32 *Eng. L. and Eq. Rep.* 1,) might seem at first to countenance such an action. But it is clearly distinguishable. The defendant was sued by the plaintiffs, for money lent to him to enable him to purchase shares of their stock. He resisted the action on the ground that the company, through its managers and directors, had represented the company as flourishing when it was insolvent, had paid large dividends, but had paid them out of capital; and by false repre-

sentations that the shares were of great value, had induced the plaintiff to purchase them, offering to advance the money to enable him to do so; and to hold the shares until a profit could be realized by a sale.

The representations of the managers were made the same as those of the company, by facts connected with the adoption, and issuing reports falsely stating the situation of the company. The directors had the whole management of the affairs; and the lord chancellor observed: "What is the consequence of the company receiving such a report (if you can separate the company from the directors,) and publishing it to the world? It must be taken, as between the company and third persons, to be a representation of the company. The company as an abstract being, can represent or do nothing. It can only act by its managers, &c. Now it is plausibly urged that these reports were not made by the company, but to the company. In form that is so. No doubt they are reports made to the company; but I assume for the present, that they were made to the company under such circumstances that what they so report is known, and intended to be known, not only to the shareholders, but to all persons who may be minded to become shareholders, just as if they were published to the world. The exigencies of society demand that reports so made, and so circulated, should be deemed to be the reports of the company."

Then, the lord chancellor discusses a proposition urged on the part of the plaintiffs, growing out of the fact that the defendants were themselves the owners of 1,100 shares in the company, previous to the purchase in question. He says: "Therefore, I come to the conclusion, that if directors in the discharge of their duty of making annual reports, giving a correct representation of the state of the funds of the company, fraudulently and with a view to raise the value of the shares, misrepresent what the state of the company is, under such circumstances that third persons, or even shareholders (whom for this purpose we may treat as third persons) are deceived,

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and act upon that misrepresentation, the persons so deceived have a right to treat themselves as having been fraudulently deceived by the company."

We perceive in this how clearly the position is defined as concerning only cases where a previous stockholder is induced into a new contract by subsequent fraudulent representations, authorized or assumed to be by the company, and of the falsehood of which, doubtless, he must be ignorant.

The opinion of Lord St. LEONARD upon the general questions, deserves great attention.

There are considerations of a general nature, connected with this question, very similar to those which lie at the foundation of the rules forbidding a dealer with a corporation from impeaching its corporate existence, or the validity of its transactions with him. (*Palmer agt. Lawrence*, 1 *Sand. S. C. Rep.* 170; *Brower agt. Appleby*, 1 *id.* 168; *Hill agt. Reed*, 16 *Barb. Rep.* 287.) They should teach us at least the utmost caution in dealing with a claim, the novelty of which induces, in my mind at least, a distrust of its legality.

The demurrer as to this part of the answer, is well taken. Judgment for the plaintiffs therein, is to be had with costs.

THE PEOPLE agt. EDWIN PARKES.

This little case shows what a *justice of the peace* can do, when he tries, to wit: That the *landlord and owner* of a house rented and kept for the purposes of *prostitution*, is to be regarded in law as the *keeper* of the house, and liable (equally with the tenant) to indictment, and to all the penalties imposed by law, if with his knowledge and consent, the house is used for such immoral purposes. And this is so, although the tenants occupying the premises hired from the owner's lessee, the landlord, however, accepting and receiving his rents directly from the under-tenants. (*The justice has the case of The People agt. Erwin, 4 Denio*, 129, to back his decision, except in that case, the tenant occupied under a lease directly from the owner, and both were indicted.)—[REPORTER.]

The People agt. Parkes.

Binghamton, Broome County, New-York.

THE defendant, Edwin Parkes, was brought before WM. M. WATERMAN, Justice, January 21st, 1858, on a charge of being a "disorderly person," and keeping a house of ill-fame.

GEORGE A. NORTHRUP, *District-Attorney, appeared for the people, and*

GILES W. HOTCHKISS, *for the defendant.*

The proceedings were under the statute, against Parkes as the owner and lessor of the house, *knowing and assenting to the fact* that it was kept as a house of prostitution.

Justice WATERMAN, in pronouncing his decision in this cause, said: That the questions now before the court for adjudication are, to what extent are landlords or lessors of dwellings liable for the acts of their tenants? Are they liable to the same extent, at least, as their tenants? Is the defendant in this cause as *landlord* and *owner*, to be regarded by law as the *keeper* of the house of prostitution in question?

Justice WATERMAN further said: That he held the landlord or lessor of a dwelling equally liable with the tenant, to indictment, and to all the penalties imposed by law, if with his knowledge and consent the house is used for unlawful and immoral purposes; that the owner is bound by law so to use his property, that the public shall not be annoyed thereby, and the moral sense of the community shocked.

The house in question might be emptied of its contents to-day, and swarm with the vicious to-morrow. The people required security from annoyance in future. That although the defendant in this cause, may have rented his dwelling in good faith to Broas—Broas having underlet the same to Johnson & Germond, who kept a notoriously bad house; yet if the defendant recognized them as his tenants, after they had taken possession, by sanctioning their evil practices, receiving from them rents, the proceeds of their ill-gotten gains, the defendant *then keeps* the house in the eye of the law, and is liable as be-

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fore stated to indictment and to all the penalties imposed for a violation of the statute. That the evidence on this examination is, that the defendant did declare that he knew his building was occupied by lewd women, harbored by Johnson & Germond; he also said in substance, that through the means there employed, he was satisfied and compensated by way of rents. That it further appeared in evidence, that the rents were paid by Johnson & Germond, directly to defendant, and to his wife, in his absence, the defendant thus recognizing in the most explicit manner, Johnson & Germond as his tenants, and making himself by law a *keeper* also of said house of ill-fame.

The justice cited a case in the supreme court, (*4th Denio's Reports*, p. 129,) to sustain his opinion in this cause; and did adjudge that the defendant Edwin Parkes, is a disorderly person, within the intent and meaning of the statute, and ordered that the said defendant give a recognizance with sufficient sureties, for his good behavior.

The bail which may be required by statute is unlimited in amount. The law declaring the committing any of the acts which constitute the person so bound a disorderly person, shall be deemed a breach of such recognizance.

SUPREME COURT.

THE PEOPLE *ex rel.* ROBERT H. ELLIS agt. AZARIAH C. FLAGG, Comptroller.

The 6th section of the "Act relating to the board of supervisors of the county of New-York," passed April 15th, 1857, reads in this way:

"The finance department of the mayor, aldermen and commonalty of the city of New-York, and its officers, shall have the like powers and perform the like duties in regard to the fiscal concerns of said board, (of supervisors,) as they possess in regard to the local concerns of said mayor, aldermen and commonalty. All moneys drawn from the treasury by authority of the board of supervisors,

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shall be upon vouchers for the expenditure thereof, examined and allowed by the auditor, and approved by the comptroller, and no such moneys shall be drawn therefrom except on the warrant drawn by the comptroller and countersigned by the mayor and clerk of the board. And no other warrant shall be necessary for such purpose."

In this case, which was a bill of the relator, for furnishing stationery to the tax commissioners in April and May, 1857, *held*, that an audit and allowance by the board of supervisors, was not sufficient to authorize its payment: it must be examined and allowed by the auditor and approved by the comptroller.

New - York General Term, March, 1858.

THE relator, in the months of April and May, 1857, furnished stationery amounting to \$167.18, to the tax commissioners of the city of New-York, which was used by them in the performance of their official duties. On the 1st of June, 1857, the bill was certified by the tax commissioners as correct, and on the 6th of July, 1857, the supervisors directed the comptroller, (the respondent,) to pay it. The bill was never examined or allowed by the auditor of the finance department of the mayor, aldermen and commonalty of the city of New-York. The respondent refused to draw his warrant as directed by the board of supervisors, and a motion was made at the special term, for a mandamus to compel him to do so. The motion was denied, and the relator appealed to the general term.

A. J. WILLARD, *for relator.*

A. R. LAWRENCE, JR., *for defendant.*

By the court—DAVIES, Justice. If this were a legal county charge, after its audit and allowance by the board of supervisors, a mandamus would lie to the county treasurer, to compel its payment. (*The People agt. Stout*, 13 How. 314; *Same agt. Same*, in *Downing's case*, 4 Abb. 25.)

But the act of April 15th, 1857, (*Laws of 1857, ch. 590*,) has introduced an entire change as to the powers of the supervisors of the county of New-York, and the mode of keeping their accounts, and the payment of county charges.

By section 6 of this act, the comptroller of the corporation

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of New-York, is made the fiscal officer of the board of supervisors, and has the same powers in reference to the fiscal concerns of said board, that he possesses in regard to the concerns of the corporation.

And this section further declares: "That all moneys drawn from the treasury, by authority of the board of supervisors, shall be upon vouchers for the expenditure thereof, examined and allowed by the auditor and approved by the comptroller."

It is therefore too clear to admit of controversy, that since the act of 1857, an audit and allowance by the board of supervisors is not sufficient to authorize the payment of any money out of the treasury.

To comply with the mandate of this law, in addition to such audit and allowance by the board, the same must be examined and allowed by the auditor, and as a further check and safeguard, be approved of by the comptroller.

As in this case, there has been no examination and allowance by the auditor, nor any approval by the comptroller, which can only be after the auditor has examined and allowed the account, and which approval is made as essential as the auditor's examination and allowance—

The judgment of the special term denying the motion for a mandamus, must be affirmed with costs.

SUPREME COURT.

ARNOLD GRAY agt. JAMES T. BROWN and EMILY A. BROWN.

The plaintiff issued his summons on a money demand, claiming the amount of the note sued upon and interest. The complaint was for the recovery upon the note made by one of the defendants, a married woman. The separate answer set up, that when the note was given by the defendant she was and now is a married woman.

The plaintiff served an amended complaint, setting out the circumstances under

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which the note was given, and that the wife was possessed of a separate estate, and praying that the plaintiff's demand be made a charge thereon. This amended complaint was returned with objections.

Held, that the complaint could not be amended in the way attempted, without leave of the court. It would be turning an action at law into one for equitable relief; and the court would not allow such an amendment, without an amendment of the summons—which could only be done with leave. The amendments of the summons and complaint were allowed on payment of costs.

Yates Special Term, November, 1857.

MOTION by plaintiff for leave to serve amended complaint, and to amend summons, &c.

The summons was in the ordinary form for money, with a notice that in case of defendant's failure to answer, the plaintiff would take judgment for \$67.43, and interest from September 16th, 1856.

The complaint which was served with the summons, was upon a promissory note, made by defendants to A. A. Flint, or bearer, for \$67.43, dated September 16th, 1856, payable one year from date with interest, and demanded judgment in the usual form. The summons and complaint were served together on the 17th of October, 1857. On the 19th day of the same month, the defendant Emily A. Brown, by her attorney, put in her separate answer, that at the time she executed the note, she was and has ever since continued to be a married woman, being the wife of the defendant James T. Brown. On the 12th of November following, the plaintiff's attorney served an amended complaint, setting out the circumstances under which the note was given, and that the defendant Emily A. Brown was possessed of a separate estate, and praying that the plaintiff's demand be made a charge on such separate estate.

The attorney for the defendant Emily, returned the amended complaint on the grounds:

- 1st. That the amended complaint was not served in time.
- 2d. That the complaint was not amendable in the particulars in which it was sought to be amended; and,
- 3d. That the amended complaint would make the original

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summons irregular, and that the summons could not be amended of course.

A. C. STORY, *for the plaintiff.*

H. J. WOOD, *for the defendant Emily A. Brown.*

WELLES, Justice. The amended complaint was served too late. It could not be amended in the way attempted, if served in time, without leave of the court. It would be turning an action at law into one for equitable relief, and the court would not allow such an amendment, without an amendment of the summons also. The summons cannot be amended without leave.

I shall, therefore, direct an order that the plaintiff have leave to amend the summons by making it one for relief, and to amend the complaint, so as to present any equitable ground of relief, as he shall be advised. These amendments are allowed only on payment of the costs of the defendant answering since the service of the answer, and in addition, of seven dollars costs of opposing this motion, all to be done in twenty days from service of this order.



SUPREME COURT.

JAMES RODGERS, plaintiff in error agt. THE PEOPLE, defendants in error.

In England and in this country, the law is, that if a man voluntarily makes himself *drunk*, it is no excuse for any crime he may commit while he is so.

But it does not follow because drunkenness is no excuse for crime, that it is not in some cases, where the question of guilt or innocence is one of *intent*, or where the degree of the crime on the same facts depends on the specific intent, a material circumstance in determining *whether any crime had been committed, or the degree of the crime which had been committed.*

The prisoner in this case, was indicted and tried for murder. The proof showed

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that the meeting in the street between the prisoner and the deceased, on the occasion when the prisoner stabbed the deceased with a knife and killed him, was not premeditated: there was no evidence nor even a pretence, that the prisoner knew the deceased, or had ever seen him before; there was nothing other than what took place on the occasion, to show that the prisoner when he struck the fatal blow, *intended* to kill the deceased. And all the witnesses agreed in saying that at the time of the occurrence, the prisoner was excited by drink, and some of them said he was very drunk.

On the trial, the judge charged the jury, that under the old law, intoxication was an aggravation of crime; but that intoxication never excused crime unless it was of the degree to deprive the offender of his reasoning faculties.

The counsel for the prisoner, substantially requested the court to charge the jury that they had a right to take the intoxication of the prisoner into consideration with the other circumstances of the case, in determining the *intent*; and that if they found that there was no intention to commit the crime of murder, the jury should find a verdict of manslaughter. The court refused so to charge, and the prisoner's counsel excepted.

Held, that the right of the prisoner to have the circumstance of his intoxication fairly submitted to the jury on the question of intent; or whether he was guilty of manslaughter or murder, was as clear and as well established by law, as the principle that voluntary drunkenness is no excuse for crime. The principles are consistent with each other. New trial granted.

General Term, March, 1858.

By the court—SUTHERLAND, Justice. Although the statute under which this case has been brought here by writ of error, gives this court the power to grant a new trial, if the court were satisfied that the verdict against the prisoner was against the weight of evidence, (*Laws of 1855, p. 613, § 3*,) yet we cannot say in this case, that the verdict was against the weight of evidence.

According to the testimony of Margaret Swanston, the wife of the deceased, there was no mutual combat, and the fatal blow was struck by Rodgers without a blow from her husband. Her testimony is partially confirmed by the witness, Clark S. Dunning.

I cannot say that their testimony did not have and ought not to have had more weight with the jury than the testimony of the prisoner's two companions, Cunningham and McGivney, although introduced and sworn on the part of the people, who

testified that blows passed between the prisoner and the deceased; on the deceased asking the prisoner why he ran against his wife. The jury had the witnesses before them, and could judge better than we can, what weight to give to their respective testimony.

Nor do I think there was error in admitting the testimony of David Scott, the boy from whom the prisoner asked the apple, a few minutes before his murderous attack upon the deceased; or in admitting the testimony of Inspector Lefferts, as to the confessions of the prisoner at the time he was arrested. As to the testimony of the former, it was certainly important to show that the prisoner had a knife, and what kind of a knife, and the disorderly conduct and reckless spirit of the prisoner, but a few moments before he struck the deceased with some deadly instrument; and as to the testimony of Lefferts, there is nothing but the mere circumstance that the prisoner was under arrest when he made the confession, from which we can infer that they were not voluntary, or made under the influence of a threat, or from intimidation.

But the exceptions of the prisoner to the charge of the court below, and to the refusal of the court to charge as requested by him, deserve consideration.

All the witnesses who speak on the subject, agree in saying that the prisoner was excited by drink—his companions, Cunningham and McGivney, say he was drunk—his mother and sister say that he was very drunk. The degree of intoxication is not important in looking at the exceptions of the prisoner.

The counsel for the prisoner requested the court to charge: "That if it appeared by the evidence, that the condition of the prisoner from intoxication was such as to show that there was no intention or motive to commit the crime of murder, that the jury should find a verdict of manslaughter." The court refused to charge as requested, but charged: "That under the old law, intoxication was an aggravation of crime, but that intoxication never excused crime, unless it was of the degree to deprive the offender of his reasoning faculties."

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The prisoner was indicted and tried for murder, and under an indictment for murder, he could be convicted of either murder or manslaughter.

The deceased was killed by the blow which the prisoner struck with some deadly instrument; deadly, because it produced death. The prisoner said it was a common pocket-knife—from the evidence of Dr. Hassel, who made the *post mortem* examination, it is probable it was a large knife, or a dirk-knife.

The meeting between the prisoner and the deceased, on the occasion when the prisoner stabbed the deceased, was not premeditated. There was no evidence, nor even a pretence, that the prisoner knew the deceased, or had ever seen him before. There was nothing other than what took place on the occasion, to show that the prisoner, when he struck the fatal blow, intended to kill the deceased. The attack was sudden, and if the prisoner intended to kill the deceased, that intention was formed on the spot; either when he struck the fatal blow which produced death, or a few moments before.

If the prisoner did intend to kill the deceased when he struck the fatal blow, he was guilty of murder, though his intention or design to kill preceded the blow but an instant. (*The People* agt. *Clark*, 8 *Selden*, 385; *The People* agt. *Sullivan*, 3 *id.* 396; 2 *R. S.* 657, § 5.)

If the prisoner struck the fatal blow in the heat of passion, without the intention or design to kill, he was guilty of one of the degrees of manslaughter only. (2 *R. S.* 661, §§ 10 and 12.)

The whole question was one of intent, to be inferred by the jury from the material circumstances of the case; and every circumstance in the case was material, which the jury was authorized to take into consideration on the question of intent.

Was the intoxication of the prisoner on that occasion a circumstance which the jury were authorized to consider in determining whether the fatal blow was struck with the intention to kill?

We think it was.

The affair was sudden ; there was evidence of a mutual combat. The two companions of the prisoner, sworn on the part of the people, testifying that blows passed between the prisoner and the deceased, the deceased striking first. All the witnesses, including Mrs. Swanston, agree in saying, that as the prisoner and his companions, in their nocturnal excursions of city rowdyism, accidentally met the deceased and his wife, and rudely came in contact with the person of Mrs. Swanston, the deceased turned around and spoke to them. The prisoner stopping says: "What is that you say?" The deceased answers, "What is that to you?" According to Mrs. Swanston's account, the prisoner then broke away from his companions and struck at her husband, aiming the blow at his breast, and then ran up the avenue. According to the account of the prisoner's two companions, blows passed before the fatal blow, as before stated. Mrs. Swanston says, that as the prisoner and his companions were coming down the avenue, approaching her and her husband, "they were three abreast, walking down and speaking loud, as if *excited, angry and quarreling*."

Now, we do not say what weight the intoxication of the prisoner and his companions ought to have had with the jury on the question of intent, had that circumstance been submitted to them with the other circumstances in the case, for their consideration. Nor will we by any means say, that had that circumstance been so submitted, we should have felt bound to disturb the verdict as against the weight of evidence, had they found the prisoner guilty of murder.

But the violent homicide for which the prisoner was tried, had different degrees, depending on the intent to kill, or the absence of such intent. The statutory definition of two of the degrees of manslaughter implies not only that a homicide committed in the heat of passion may have been committed without the intention to kill, but that also such heat of passion is likely to prevent the reasoning, calculation, reflection or design, implied by a particular intent.

Can any one say, that intoxicating drinks taken into the body do not tend to intoxicate the mind, and to inflame the

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passions? that they do not tend to make anger and other revengeful passions more excitable? Can any one say, that intoxication does not tend to produce a confusion of mind of material consideration on the question of a specific intent, where from all the other circumstances in the case, it is evident the intent originated on the spot, but an instant before the blow, or coterminously with the will to strike the blow?

All human experience proves the contrary.

No doubt great caution is necessary in the application of this doctrine.

We do not say that it should be applied in every case where there is evidence of premeditation aliunde the circumstances of the affray, or occasion on which the homicide was committed; for we know that it is not unusual for criminals to fortify themselves for crime with liquor. But in homicides of different degrees according to the intent, and in larcenies, forgeries and other crimes, depending on intent or knowledge, in many cases the intoxication of the prisoner is a material circumstance for the jury. Surely, it would not be legal or right to convict a man of passing a counterfeit bill, knowing it to be counterfeit, when he was so intoxicated as not to know a counterfeit bill from a genuine one, without proof to show that previous to his intoxication he knew it was counterfeit.

In this case, we think the court below erred in withdrawing the attention of the jury from the circumstance of intoxication in the manner the case shows.

The counsel for the prisoner substantially requested the court to charge the jury, that they had a right to take the intoxication of the prisoner into consideration with the other circumstances of the case, in determining the intent, and that if they found that there was no intention to commit the crime of murder, the jury should find a verdict of manslaughter.

The court, by refusing to so charge, and thereupon charging that intoxication was an aggravation of crime, that it "never excused crime unless it was of a degree to deprive the offender of his faculties," not only erred in refusing to submit the circumstance of intoxication to the jury, for their consideration

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as to whether they should find the prisoner guilty of murder or manslaughter, but may have led the jury to suppose that his intoxication was absolutely to be weighed against him in settling their verdict as between murder and manslaughter. And certainly, had the prisoner been on trial for manslaughter only, his intoxication would have tended to make out, and perhaps to aggravate the crime; because it would have tended to show, that the prisoner did the act in the heat of passion.

The error of the court below, does not consist in charging the law wrong as far as the court positively charged; but in giving to the jury good law, on a point where it was applicable, as a reason for refusing to charge other good law as requested, as to the point of intention where it was applicable.

It is true; and the law in England and this country is, that if a man voluntarily makes himself drunk, it is no excuse for any crime he may commit while he is so. (1 *Hale*, 7; 4 *Black. Com.* 26; *People agt. Pine*, 2 *Barb.* 566.)

But it does not follow because drunkenness is no excuse for crime, that it is not in some cases, where the question of guilt or innocence is one of intent, or where the degree of the crime on the same facts, depends on the specific intent, a material circumstance in determining *whether any crime had been committed, or the degree of the crime which had been committed.*

We think, that in this case, the right of the prisoner to have the circumstance of his intoxication fairly submitted to the jury on the question of intent; or whether he was guilty of manslaughter or murder; as clear and as well established by law, as the principle that voluntary drunkenness is no excuse for crime. The principles are consistent with each other. (See *Am. Crim. Law*, §§ 41, 44, and cases there cited.)

The prisoner stands confessedly guilty of a great crime, and one which from the bold, rowdy recklessness of human life which it and its attending circumstances displayed, calls for a firm condemnation of the law, according to the most stringent, but just rules by its interpretation and its principles, whatever weight his intoxication might have with a jury as to the degree of his crime.

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The prisoner has his legal rights, and it is the duty of the court, uninfluenced by the repulsive features of his admitted crime, or the condemnatory comments of an excited public press, to see that those rights are protected, and that he is condemned according to the rules of law.

We think, for the reasons above stated, he may have been prejudiced from not having had the circumstance of his intoxication submitted to the jury with the other circumstances of the case, especially considering the positive charge of the court, and that he is therefore entitled to a new trial.

SUPREME COURT.

HASBROUCK SHAFER, Receiver, &c., of the goods, &c., of
JOSEPH W. BARLOW agt. PHILIP HUMPHREY.

The complaint must conform to the summons as to the *nature of the action*. If not, the complaint will be set aside. The summons must control the complaint in that respect. (*The cases of Boynton agt. Lapham*, 14 How. 360; and *Tuttle agt. Smith*, *id.* 395, approved.)

The summons in this case stated that if the plaintiff failed to answer the complaint as required, the plaintiff would take judgment against the defendant for \$300, with interest, besides costs. On demand, the defendant's attorney was served with a copy complaint in the nature of a creditor's bill to set aside a written instrument for fraud, &c.; and that the plaintiff as receiver have judgment against the defendant for \$500 and costs, or for such other relief, &c. *Held*, that the complaint be set aside as an unauthorized departure from the summons in regard to the nature of the action. And a general *appearance* in the suit by the defendant before the service of the complaint, is not a waiver of such irregularity. (*See, contra, Webb agt. Mott*, 6 How. 439.)

Broome Special Term, February, 1857.

WM. YEOMANS, JR., *for plaintiff.*

H. KRUM, *for defendant.*

MASON, Justice. This is a motion to set aside complaint

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for the one amongst other reasons, that the plaintiff's complaint does not conform to the summons, in regard to the nature of the action. The summons, which was served on the 13th December, 1857, stated that if the defendant failed to answer the complaint as required, that the plaintiff would take judgment against the defendant for \$800, with interest, besides costs. On the 12th day of January, 1858, H. Krum, Esq., defendant's attorney, served notice of retainer, and that he appeared in the action for the defendant, and demanded a copy of the complaint; and on the 20th January, the plaintiff's attorney served upon Mr. Krum a copy of the complaint, which is in the nature of a creditor's bill, to set aside a written instrument executed by Barlow, the judgment debtor, transferring his personal property to the defendant Humphrey, upon the ground that the same is fraudulent, and made with the intent to hinder, delay and defraud the creditors of the said Barlow. The complaint sets forth the recovery of a judgment against Barlow, in the supreme court, in favor of William Yeomans, Jr.; the issuing of an execution thereon, and the return of the same by the sheriff *nulla bona*, and of proceedings supplementary to execution, and of the appointment of the plaintiff as receiver. The plaintiff demands judgment that the said contract set forth in the complaint, by which Barlow transferred this personal property to the defendant, be set aside as fraudulent and void, and that the plaintiff as receiver, have judgment against the defendant for \$500, and costs of suit, or for such other relief as to the court may seem just in the premises.

This complaint must be set aside as an unauthorized departure from the summons, in regard to the nature of the action. Where the cause of action is of a different nature from that stated in the summons, the complaint will be set aside. I concur with my brother BALCOM, in *Ridder and others* agt. *Whitlock*, (12 *How. Pr. R.* 208,) and which case has been approved by Justice WELLES, in *Boynston* agt. *Lapham and others*, (14 *How. R.* 360,) and by the general term in the second district, in *Tuttle and others* agt. *Smith*, (14 *How. R.* 395.)

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The summons must control the complaint as to the nature of the action. It is the first in order after the proceedings in the suit, and upon it the defendant is brought into court; and if, therefore, the complaint does not conform to the summons, in regard to the nature of the action, the complaint will be set aside. (12 *How. R.* 20; 14 *How. R.* 360; 14 *How. R.* 395.) Justice CRIPPEN fell into an error in *Webb agt. Mott*, (6 *How. R.* 439,) in holding that the complaint will control the summons where they are served together. I concur in the later cases above referred to, which hold that the complaint must conform to the summons. The same error was committed in *Webb agt. Mott*, in holding that a general appearance of the defendant in the suit, was a waiver of such an irregularity, and the party could not move to set aside either summons or complaint. The appearance admits the regularity of the summons, but it does not admit the identity of the cause of action indicated by the summons with that set out in the complaint, and this is so when they are both served together. (14 *How. R.* 395.) When, as in the present case, the summons is served alone, and the defendant appears generally in the cause by attorney, and demands a copy of the complaint, it is simply absurd to say that he waives an objection to a complaint which is served after his appearance. There is no irregularity in the summons for which it could be set aside, and no defect or irregularity which could be waived. The plaintiff has a right to go on under it and complain against the defendant in any action which is not a departure from the nature of the action stated in the summons, but has no right to depart from the summons as he has in this instance. The complaint must be set aside with leave to the plaintiff, to amend either summons or complaint on the payment of \$10 costs of this motion.

Wallis agt. Lott, late sheriff.

SUPREME COURT

GEORGE WALLIS and ALFRED WALLIS agt. ENGLEBERT
LOTT, Late Sheriff.

A pretended service of process on a defendant may be disproved by affidavit upon motion. (*See to the same effect, Van Rensselaer agt. Chadwick, 7 How. 297.*)

In this case it was clearly proved that the summons was not served on the defendant, on the day stated in the affidavit of service inserted in the judgment roll. The judgment would therefore have been set aside for irregularity, had it not appeared on the part of the plaintiff, that the defendant had admitted that he received the summons the next day, which was more than twenty days before the judgment was entered.

MOTION to set aside judgment, for irregularity.

J. L. CAMPBELL, *for defendant.*

L. HURST, *for plaintiff.*

BIRDSEYE, Justice. There is no question in this case, about the impeachment of a sheriff's return to a *capias*, which is matter of record, and for that reason not to be impeached. And since the case of *Van Rensselaer agt. Chadwick*, (7 How. 297,) there can be no doubt that the fact of a pretended service of the process on the defendant, may be disproved by affidavit, upon motion. The fact is clearly established in this case, that the summons was not served on the defendant by Jacobson, on the 20th of October, 1856, as is stated in the affidavit of service inserted in the judgment roll. The judgment would therefore be set aside, did it not appear on the part of the plaintiffs, that the defendant had admitted that De Mott handed the summons to the defendant, the next day after it was, by mistake, served on De Mott; that the defendant so received it more than twenty days before the judgment was entered up; that he consulted counsel, as to the fact whether such a service was sufficient. This, together with the

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very considerable delay there was in making the motion, after the filing of the judgment roll, induce me to deny the present motion, though without costs and without prejudice to a renewal of the motion upon the merits.

SUPREME COURT.

MARY W. BARKER, by HIRAM HORTON, her next friend agt.
DAVID BARKER.

Defendant was required by an order of the court to pay a certain amount of costs of suit, and a certain sum annually to defendant for alimony. He had sold his property and abandoned his wife, and gone to Canada. A copy of the order was there served on him personally, which he refused to comply with. The plaintiff then moved to strike out his answer, and for other relief, unless he complied with the order.

The defendant opposed this motion, and at the same time made a cross motion to have the order modified, on the ground that he was not worth as much as was sworn to on obtaining the order.

The court thought the defendant did not come before it with a very good grace to ask a favor while in contempt. It would have looked better if he had complied with the terms of the order, if he wished to avail himself of his excuse for a modification. Plaintiff's motion was granted with costs, with certain conditions, specified.

MOTION to strike out answer, and for further relief, unless defendant comply with the terms of an order heretofore made by Justice ROSEKRANS, requiring him to pay \$50 for expenses of suit and \$150 annually, in payments of \$75, at the end of every six months, for alimony. Defendant sold out his property in this state, and absconded to Canada, where he now resides, for the purpose of being out of the jurisdiction of the court, and abandoning plaintiff, his wife, as he declared to persons whose affidavits detail that fact among others. An order to show cause was first made at Malone on the 5th September last, when defendant's attorney appeared and moved

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a postponement, on the ground that defendant was too ill to attend. An adjournment was granted until the 11th at the chambers of the justice at Plattsburgh. On the latter day the plaintiff appeared, but the defendant did not, and the justice granted the order, a copy of which was served on defendant's attorney, on the 12th day of November last, but could not be served on defendant, by reason of his absence from the state. Subsequently, a copy was served on defendant at his residence in Dundee, Canada, and a demand made, but payment was refused.

Defendant read in opposition to this motion, an affidavit of his attorney, that the absence on the part of defendant, on the 11th September, was caused by an accidental detention of the cars. Defendant's counsel also read an affidavit of defendant, denying that he is worth \$7,000, as stated in plaintiff's papers, and averring that he is only worth about \$2,200; but not denying that he had absconded for the purpose of avoiding the service of process in this suit, or that he had declared so; and on these affidavits, makes a cross motion for the modification of the order of Justice ROSEKRANS.

HUTTON & CANTWELL, *for plaintiff.*

H. A. PADDOCK, *for defendant.*

C. L. ALLEN, Justice. The defendant is in contempt for disobeying the order of Justice ROSEKRANS. If he wished to avail himself of his excuse, he should have complied with the terms, and then applied for a modification. Besides, although he denies that he is worth the sum of \$7,000, and avers that he is only worth about \$2,200, yet he does not deny its other allegations in plaintiff's affidavits, that he has absconded to Canada for the purpose of abandoning plaintiff, of being beyond the reach of the process of this court, and that he has sold out his property for the same purpose, and that he declared before leaving, that such was his intention.

He comes not, therefore, with a very good grace to ask a favor of the court, and his motion must be denied. An order

Trust agt. Repoor.

must also be entered requiring him to comply with the terms of the order of Justice ROSEKRANS in twenty days after service of a copy of the order hereby granted, with \$10 costs of this motion, on his attorney; or that in default thereof, his answer be stricken out, and that the cause proceed on the part of the plaintiff, without such answer; proceedings on his part to stay until a full compliance with the order; and plaintiff is to have leave to apply for such further relief as she may be advised, in case defendant fails to comply with the terms of this order.

Order accordingly.

SUPERIOR COURT.

TRUST agt. REPOOR.

A client has a right to change his *attorney* at his own volition, whatever may be his motives; whether a mere caprice or a substantial reason. The relation requires the most unlimited confidence and perfect harmony. The attorney has no claim upon papers placed in his hands, except the lien upon them to secure costs and fees; and even this lien will be, under certain circumstances, so modified as to compel him to produce such documents upon an emergency pressing for their use.

This was an order on the plaintiff's attorney to show cause why he should not deliver up to the plaintiff all the papers and documents in his hands, or obtained by him as attorney for the plaintiff. *It seems*, the action was for *crim. con.* (cases in which occasionally it appears an attorney has quite an extensive practice;) and the plaintiff charged that the attorney had received from the wife of the plaintiff a number of letters written by the defendant, which proved the truth of the allegations of the complaint, viz: intercourse with the plaintiff's wife; that the attorney told him that they were sufficient to insure a recovery; that he often refused to permit the plaintiff to peruse such letters; and charged that the attorney had delivered those letters to defendant. These allegations were positively denied by the attorney. The affidavits were conflicting. An order for a written consent for a substitution to be given by the attorney, was granted, on his being paid \$30 costs; and to surrender to the new attorney all the papers in the action under his control.

Special Term, December, 1856.

AN order was served on the plaintiff's attorney to show cause why he should not deliver up to the plaintiff all the papers and documents in his hands, or obtained by him as attorney for the plaintiff, as also the papers in the action, and why he should not deliver up to the plaintiff a consent for substitution of another attorney as the plaintiff may nominate.

MR. FOGARTY, *for the motion.*

MR. BULKLEY, *in person.*

His Honor Justice HOFFMAN, delivered an opinion in substance as follows:—That a client has a right to change his attorney at his own volition whatever may be his motives; whether a mere caprice or a substantial reason. The relation requires the most unlimited confidence and perfect harmony. The attorney has no claim upon papers placed in his hands, except the lien upon them to secure costs and fees—and even this lien will be, under certain circumstances, so modified as to compel him to produce such documents upon an emergency pressing for their use. That prior to the Code, an attorney, even when acting as counsel, had no lien upon papers except for such costs as were then taxable under the fee bill. If there had been no agreement to pay a fixed sum, or to be ascertained in a manner defined between the parties, it might be different; the case of *Merritt agt. Lambert*, (10 Paige, 357,) warrants this conclusion. But the Code makes the question a new and a different one. The Code gives a certain sum to the prevailing party by way of indemnity. The measure of compensation to an attorney or counsel, is left to agreement, express or implied.

But the plaintiff in his affidavit, brings a charge against the attorney, that he received from the wife of the plaintiff a number of letters, written by the defendant, which prove the truth of the allegations of the complaint, viz: intercourse with the plaintiff's wife; that Bulkley told him that they were sufficient to ensure a recovery; that he often refused to permit the

Bortel agt. Ostrander.

plaintiff to peruse such letters. In a subsequent affidavit he says: that he is informed and believes, that Bulkley has delivered up those letters to the defendant.

The affidavit of Mr. Bulkley is positive and decided, that he never had any letters which proved the truth of the allegations; that he never had a letter signed by the defendant, and never received any letter purporting to be written by the defendant.

Andreas Trust swears that he went with his mother to Bulkley's office, and then demanded her letters, on which occasion he said that he had delivered them up to a third party, but would not disclose to whom; that his oath prevented his telling the name of the person to whom he had given them. Mr. Bulkley's further affidavit contradicts that of Andreas Trust, and contains a copy of a receipt from Mrs. Trust, of all the letters and papers delivered by her to him.

A written consent for a substitution must be given by Mr. Bulkley, and that upon his being paid \$30 as a fee, he surrender to the plaintiff, or to any new attorney, all the letters and papers under his control, relating to the action.

SUPREME COURT.

WILLIAM H. BORTEL agt. WARREN OSTRANDER.

An action against a *constable* for the recovery of overplus moneys collected by him on execution, cannot be sustained, where the action is brought before the *return day* of the execution, and where *no demand* of such moneys has been made. The action is premature.

Albany General Term, December, 1857.

W. B. WRIGHT, I. HARRIS and G. GOULD, *Justices.*

THIS action was commenced on the fourth day of January, 1856, in a justice's court, against the defendant, a constable,

Bortel agt. Ostrander.

for the recovery of \$10.57 overplus moneys collected by him on an execution against this plaintiff.

It was admitted on the trial, that on the 26th day of December, 1855, the defendant being a constable, &c., sold the property of the plaintiff on an execution against him in favor of Matthew Taber. That he received on such sale the sum of \$10.57, over and above the amount of judgment and fees, for collection. On this evidence, the justice rendered judgment in favor of defendant for costs.

On appeal, the county court affirmed the judgment, on the ground, "that there was no evidence of an intention on the part of the constable to withhold the overplus from the judgment debtor."

J. F. CRAWFORD, *for appellant* :

The evidence on the trial was sufficient to sustain the action.

It is provided by statute, "that the constable shall return the execution and pay the debt or damages and costs levied, to the justice who issued the same, returning the overplus, if any, to the person against whom the execution issued. (2 R. S. 3d ed. 347, § 349.)

Section 164 of the same statute, gives an action of assumpsit against a constable for moneys not paid over according to law.

No proof of *demand*, made before suit, for the payment of the money, was necessary. (*Dygert agt. Crain*, 1 *Wendell R.* 534; *Brewster agt. Van Ness*, 18 *Johnson R.* 133; *Lytle agt. Hoyt*, 5 *Hill R.* 395.)

There can be no injustice in the application of the rule to this case. Plaintiff waited six days after the constable had paid over to Taber the amount going to him, before commencing suit.

There is no evidence to warrant the presumption suggested by the county judge, that the defendant in this execution might have resided in a foreign county, inaccessible to the constable,

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or that he might have purposely kept concealed or out of the way of the constable.

A man is presumed to reside where he is sued. (9 *Barbour*, 60.)

It is not to be presumed that any man has acted fraudulently. (1 *Phil. Ev.* 451.)

If there was any special circumstances taking this case out of the general rule, it belonged to the constable to show it, by way of defence.

The statutory provision giving the constable sixty days in which to return the execution has relation to the rights of the plaintiff, and not the defendant in the execution. It declares the liability of the constable to the plaintiff, but does not in any respect affect the rights of the defendant or justify the constable in withholding from him the overplus moneys actually collected.

J. O. MOTT, *for respondent*:

I. The action was prematurely brought; the time in which to return the execution had not yet expired.

1. The manner in which a constable shall sell goods and chattels, is directed by statute; and in the same section it is provided, that the constable shall return the execution and pay the debt or damages and costs levied, to the justice who issued the same, returning the overplus, if any, to the person against whom the execution issued. (2 *R. S.*, 4th ed., p. 448, § 131.)

2. Every execution issued by a justice of the peace, shall be dated on the day when it actually issued, and shall be returnable sixty days from the date of the same. (2 *R. S.*, 4th ed. p. 447, § 127; subdivision 12 of § 64 of the Code.)

3. A constable has five days after the return day of an execution, in which to pay over money collected upon an execution; consequently, no action can be maintained until the sixty-five days from the date of the justice's execution have expired. (2 *R. S.* 4th ed. p. 449, § 142.)

4. The constable had the same length of time in which to

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return the *overplus*, as to pay the *debt or damages and costs*. (*Subdivision 12 of § 64 of the Code*; 2 *R. S.* 4th ed. p. 448, § 131; 2 *id.* p. 447, § 127; 2 *id.* p. 449, § 142.)

5. A party cannot compel an officer to return an execution until after the expiration of the return day of the process. (*Morange agt. Edwards*, 1 *Smith N. Y. C. P. Rep*; *Wilson agt. Wright*, 9 *How. Pr. Rep.* 460; see rule 6 of *Supreme Court Rules*.)

6. The execution is regular upon its face; (*Bander agt. Burley*, 15 *Barb. S. C. R.* 404; *Price agt. Shipp*, 16 *id.* 585;) but no objection was made to the validity of the execution, or any proceeding of the constable, up to and including the sale. The plaintiff expressly sanctions the proceedings, by bringing this action for the overplus.

II. In order to maintain an action for overplus moneys in the hands of a constable, arising from a sale of property by virtue of an execution, it is necessary to make a demand upon the officer for its payment, before suit.

1. A person to be eligible to the office of constable, must be an *elector* of the town for which he is chosen.* (1 *R. S.* 4th ed. p. 654, § 31.)

2. An *elector* must be a resident of the district or town in which he votes. (*Article 2, § 1 Constitution of 1846*.)

By the court—GOULD, Justice. All the facts in this case are admitted, and are as follows: On the 17th of December, 1855, the defendant (a constable) received an execution from a justice of the peace, against the property of the present plaintiff; which execution was returnable in sixty days, (February 13th, 1856.) On the 21st of December, 1855, the constable under said execution made a levy on two cows; on the 29th of December, 1855, he sold one cow, for a sum which exceeded the execution and his fees, by \$10.57. At some time prior to the day of trial of this suit, the constable paid to the plaintiff in that execution, the amount due to him. On the 4th day of January, 1856, this present plaintiff commenced against the constable this suit, for the \$10.57 surplus moneys, on the sale

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of the cow. The justice gave judgment for the defendant; which judgment the county court affirmed, (on appeal, by plaintiff,) on the ground that the action was prematurely brought, as the return day of the execution had not arrived, nor had the plaintiff made any demand of the surplus moneys. From that judgment of the county court the plaintiff appeals to this court.

The cases cited by plaintiff, are all instances where sheriffs having executions of courts of record, had allowed the *return* day to pass, and had neither paid the moneys into court, (as in such courts they may,) nor paid them to the party whose they were. There indeed, there can be no doubt that a *demand* was not necessary before suit, as the officer by *doing his duty and paying the money into court*, could have discharged himself from all liability. But here the case is entirely different. The justice could not receive this money: nor could any one but the plaintiff. *When* was the constable, (where no *demand* was made on him,) bound to pay it? By 2 Revised Statutes, (4th ed.,) p. 448, § 131, he must return the execution, pay debt, &c., to justice, "*returning* the overplus," to the defendant in the execution. This "*returning*," does not precede the return of the execution, but follows it; and for the return of the execution he has till the return day; until which day, even though he has collected the money, he is not obliged to make his return. To be sure, in this case, he actually was very prompt in doing his duty, and did have the execution satisfied before this *trial*. Though it does *not* appear anywhere in the case, that the execution was *actually returned* before the trial of this cause. I can see no possible ground of accusing the officer of any actual neglect of duty; and I fully concur with both county court and justice, in saying that, where the return day was not past, and no demand of the surplus moneys had been made, the plaintiff's action was prematurely brought.

County court judgment affirmed.

NOTE.—In the case of *Vence* agt. *Vence*, *ante*, page 497, the order was appealed from, and the appeal argued at the May general term, 1858, at Elmira, before Justices GRAY, MASON, BALOOM and CAMPBELL, and the order affirmed.

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